No. 95-___

In The

Supreme Court of the United States

October Term, 1995

EXXON COMPANY, U.S.A.;
EXXON SHIPPING COMPANY,

Petitioners,

v.

SOFEC, INC.; PACIFIC RESOURCES, INC.;
HAWAIIAN INDEPENDENT REFINERY, INC.;
PRI MARINE, INC.; PRI INTERNATIONAL, INC.,

Respondents,

v.

GRIFFIN WOODHOUSE, GRIFFIN WOODHOUSE, INC.,
BRIDON FIBRES AND PLASTICS, LTD.,

Third-Party Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. After this Court decided *United States v. Reliable Transfer Co., Inc.* may an admiralty court exonerate defendants from all liability to a shipowner for the loss of its tanker when defendants conceded that their breaches of maritime duties imposing strict liability in tort and negligence were causes-in-fact of the vessel's standing because the court found that the tanker's captain was grossly negligent in navigating the imperiled vessel?

2. After this Court decided *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.,* may an admiralty court exonerate defendants from all liability to a shipowner for the loss of its tanker after defendants conceded that their breaches of express and implied warranties were causes-in-fact of the vessels' stranding because the tanker captain was grossly negligent in navigating the imperiled vessel?

PARTIES

The parties are Petitioners/Plaintiffs Exxon Shipping Company and Exxon Company, U.S.A., Respondents/Defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc., PRI International, Inc. and Sofec, Inc., and Respondents/Third-Party Respondents Bridon Fibres & Plastics, Ltd. and Griffin Woodhouse, Ltd. Werth Engineering & Marine, Inc., initially a third-party respondent, was dismissed before trial by stipulation of the parties.[1]

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[1] Pursuant to Rule 29.1, Petitioners state that the non-wholly owned subsidiaries and affiliates that have issued public shares in Petitioners are as follows: Sea River Maritime, Inc., successor in interest to Exxon Shipping Company, Compania Minera Disputada de las Condes S.A.; Esso Malaysia Berhad; Esso Societe Anonyme Francaise; General Sekiyu, K.K.; Imperial Oil Limited; Les Docks des Petroles d'Ambes; Societe Francaise Exxon Chemical; Tonen Kabushiki Kaisha.

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OPINION

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in *Exxon Shipping Co. v. Sofec, Inc.*, 54 F.3d 570 (9th Cir. 1995). A copy of the Slip Opinion is annexed hereto as Appendix A ("App. A").

JURISDICTION

The opinion of the Court of Appeals was filed on April 26, 1995. A timely petition for rehearing was denied by order filed May 24, 1995; a copy of the Order is annexed hereto as Appendix B ("App. B"). The district court's jurisdiction was in admiralty, pursuant to 28 U.S.C. § 1333. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall . . . be deprived of . . . property, without due process of law. . . . "

Section 1333 of 28 U.S.C. provides, in pertinent part: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

STATEMENT OF THE CASE

Petitioners Exxon Shipping Company and Exxon Company, U.S.A. ("Exxon") brought this admiralty action against the owners and operators of an oil refinery and a mooring facility in Oahu, Hawaii (collectively "HIRI" or "HIRI respondents")[2] and against Sofec, Inc. ("Sofec," manufacturer of the defective mooring system that failed) seeking damages for stranding and total constructive loss of Exxon's tanker, the HOUSTON, caused by breach of an express warranty of safe berth, breaches of implied maritime warranties, strict products liability, and negligence. HIRI filed a third party complaint against Bridon Fibre & Plastics, Ltd., Griffin Woodhouse, Ltd., and Werth Engineering & Marine, Inc., manufacturers and suppliers of the "chafe chain" that broke, setting the tanker adrift from HIRI's Single Point Mooring System ("SPM").

The HOUSTON was a 766-foot long tanker, weighing over 72,000 dead weight tons.[3] The tanker's Master was Captain Kevin Coyne.[4] His deck assistants were his chief

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[2] The related corporations are Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc., PRI International, Inc. CR 1.

[3] Unless otherwise indicated by record citations, the recited facts are contained in the district court's Findings of Fact and Conclusions of Law, filed May 20, 1993. A copy of the Findings of Fact and Conclusions of Law is annexed hereto as Appendix D (App. D).

The abbreviations used herein are "ER," Excerpts of Record filed in the Ninth Circuit; "RT," Reporter's Transcript and "CR," Clerk's Record.

[4] After the stranding but before trial, the Captain changed his name from "Dick" to "Coyne."

mate, second mate, and two third mates. Six able-bodied seamen formed the remaining deck complement.

This maritime drama ending with the loss of the tanker, loss of cargo, and injury to a seaman began with a written contract by which Exxon agreed to sell a tanker load of crude oil to the HIRI respondents delivered to HIRI's SPM, located one and a half miles off the Oahu coastline. Title to the crude oil was to pass to HIRI when it entered HIRI's cargo hoses. The contract contained an express warranty of safe berth in Exxon's favor.[5]

The Defective SPM. The SPM consisted of a buoy anchored to the seabed, pipelines running from the buoy to shore, a mooring assembly comprised of a bridle attached to the buoy and a mooring hawser and a chafe chain that tethered the tankers to the mooring assembly while cargo was being discharged to HIRI's two 840-foot cargo hoses. The cargo hoses were attached to the buoy by heavy metal spool pieces. When cargo was being discharged, the cargo hoses were affixed to the manifolds of tankers. The cargo hoses discharged the crude oil into chambers in the SPM; the oil was thereafter conveyed to undersea pipelines connected with HIRI's refinery. The

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[5] Exxon's contract with the HIRI respondents contained the following covenant of safe berth: "The terminal shall provide a safe berth to which vessels may proceed to or depart from, and where the vessel can always lie safely afloat. However, notwithstanding anything contained in this clause, the terminal shall not be deemed to warrant the safety of public channels, fairways, approaches thereto, anchorages, or other publicly-maintained areas either inside or outside the port area where the vessel may be directed."

Warranties of safe berth are frequently found in marine charters; the HOUSTON was not chartered.

cargo hoses had originally been equipped with safety devices to permit quick release of the hoses in emergency situations, including mooring failures, but the HIRI respondents had removed the safety devices from the cargo hoses and replaced them with twelve heavy bolts to secure the hoses to tankers. (12/9/93 RT 61-64. CR 555; ER 143, 744; 12/8/92 RT 8, 22-23, 34-35, ER 157-58.)

Before giving Exxon their express warranty of safe berth, the HIRI respondents had been warned by their own experts that SPM failures were inevitable and that their cargo hoses (sans safety devices) were dangerous, creating the hazards of grounding and oil spills to every tanker that moored there unless the safety devices on the hoses were replaced and additional adequate safety measures were undertaken. (*Ibid.*)

The SPM had failed twice before the HIRI respondents gave Exxon their warranty of safe berth, and they therefore knew that the berth was dangerous when they warranted its safety. They disregarded their experts' advice and undertook none of the recommended safety measures. (*Ibid.*) All of the perils against which they had been warned were visited upon the HOUSTON, her hapless captain and her crew when the SPM failed: The chain tethering the tanker to the SPM broke, both cargo hoses broke, and the tanker was set adrift burdened by the full 840-foot length of one of the cargo hoses bolted to the manifold and the second hose which broke near the water line. HIRI had no tugs with sufficient power to help the

stricken tanker. Moreover, HIRI's mooring masters had not been trained to manage tankers in such emergencies.[6]

The Pretrial Order Bifurcating Liability. The respondents moved the district court to bifurcate liability by first trying only the conduct of the HOUSTON's captain after the SPM, its equipment and the cargo hoses had all failed. They argued that if the court found that the Captain's navigation of the crippled tanker was negligent, the case could probably be settled and further discovery avoided. (CR 427, 7/27/92 RT 6.) To persuade the court to grant their motion, respondents conceded that their breaches of admiralty duties were causes-in-fact of the tanker's grounding. They argued that by trying only Captain Coyne's conduct, the whole case could go away because the court could find that Captain Coyne was negligent and that his negligence was a superseding cause of the stranding. (*Ibid.*) Exxon vigorously opposed the motion. It explained that the liability issues were not severable, that trying the Captain's conduct before Exxon was permitted to put on its liability case-in-chief would hopelessly distort causation and all other aspects of legal liability and that bifurcation would prevent the court from determining comparative fault as required by *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397, 95 S. Ct. 1708, 44 L.Ed.2d 251 (1975) (hereafter " *Reliable Transfer*"). (CT 427, 7/27/92; RT 24; CR 369.) The court granted respondents' bifurcation motion by order filed July 31, 1992. A copy of the order is annexed hereto as Appendix E ("App. E").

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[6] After the loss of the HOUSTON, the Coast Guard required the HIRI respondents to undertake the safety measures they had earlier ignored. 2/25/93 RT 170-73; Exs. 322, 331, 332.

Exxon moved for partial summary judgment on the ground that the dangerous condition of the SPM, the chafe chain and the cargo hoses violated the HIRI respondents' express warranty of safe berth and breached all of the respondents' implied admiralty warranties. (CR 433, ER 49-50.) The court denied the motion on the ground that its bifurcation order prevented its considering anything in Phase I of the trial that occurred before the second cargo hose broke (called "the breakout"), but the court said that it would consider additional breaches of warranty if any occurred after the tanker was adrift. (CR 538, ER 132.) The court said that it would decide whether the Captain's negligence was "an overriding" cause of the stranding at the end of Phase I and that "[y]ou are really going to confine it to those few minutes – as he gets out towards the last few minutes before the grounding." (2/9/93 RT 50.)

Exxon's Offer of Proof. After Exxon had failed to dissuade the court from bifurcation, it offered to prove that the HIRI respondents knew that the berth was unsafe before the tanker sailed to Hawaii, that HIRI's own experts had advised them that a breakaway was inevitable, that removal of and failure to replace the safety devices on the cargo hoses made them very hazardous to every tanker at the SPM, that powerful tugs were needed to prevent groundings when the equipment failed, and that respondents ignored all those warnings, installed none of the safety devices and took none of the other measures that had been recommended to make the berth safe. (2/9/93 RT 61-64, CR 544; ER 143, 744; 12/8/92 RT 8, 22-23, 34-35, ER 157-58.)

Exxon also offered to prove that Sofec had failed to order the proper chafe chain, failed to test it, and failed to

provide adequate instructions regarding operating parameters. As against Bridon and Griffin, it offered to prove that those parties manufactured or supplied the defective chafe chain which had been poorly designed and inadequately tested. (2/9/93 RT 61-64.)

Trial. The district court foreclosed Exxon from ever offering any evidence on its case-in-chief. It was not permitted to prove any breaches of the duties that respondents owed to it before the breakout, the risks of loss that those duties imposed upon them, or the admiralty policies laid down by this Court for allocating the risks for such breaches of admiralty duties and contracts. The court also excluded the judgment of the Administrative Law Judge of the Department of Transportation that had exonerated Captain Coyne from any negligence in the stranding. (ER at 293; 2/9/93 RT 40-42.)

At the end of Phase I of the liability trial, the district court entered judgment for respondents holding that none of them had any liability for the loss of Exxon's tanker because Captain Coyne's navigation of the crippled tanker was the superseding cause of the stranding. A copy of the Judgment in a civil case filed April 20, 1994 is annexed hereto as Appendix C ("App. C").

Brief Summary of the Evidence. The HOUSTON moored at the SPM on March 1, 1989. On March 2, 1989, while the tanker was discharging oil into HIRI's cargo hoses, a heavy storm arrived and with it high waves and severe ocean currents moving toward shore. At 1715 (5:15 p.m. Honolulu time), the chafe chain broke and set the tanker adrift. Captain Coyne was unable to keep the tanker close to the SPM, and the drifting tanker put tension on the cargo hoses. At 1725, the first cargo hose broke near the

water line. At 1728, the second huge cargo hose broke away from the buoy bringing with it the heavy metal spool piece that had secured the hose to the SPM (the "breakout"). The HOUSTON's crew stopped crude oil from entering the cargo hoses when the chafe chain broke, thereby then limiting the oil spill to the oil in the cargo hoses.

From the time of the breakout until minutes before the tanker stranded, the vessel was crippled by 840 feet of trailing cargo hose that, together with the spool piece, weighed 1700 pounds and severely restricted the tanker's navigability. The spool piece caused a portion of the hose to sink while the remainder was partially floating and partially submerged. The hose repeatedly began moving under the tanker threatening to entangle her propeller or rudder. That danger would have been significantly increased if the tanker had been navigated either forward or turned. If the propeller or rudder were fouled, she would have been helpless. Captain Coyne ordered the tanker to back, although she was not designed to transit by backing and backing the tanker was ponderously slow and difficult.

The HIRI respondents had no tugs with enough power to assist distressed tankers when their SPM failed, and they knew that any help from the Coast Guard was hours away. When the second hose broke, HIRI had available only one small tug, the NENE, which was directed to secure a line to the hose to try to prevent it from fouling the rudder or the propeller.

In the hours after the NENE's crew succeeded in getting a line on the cargo hose, the HOUSTON was in constant peril from the cargo hose while the crews of the

tanker and the NENE were battling the hose, the storm, the high seas, the adverse ocean currents, darkness and casualties.[7] Captain Coyne earlier tried unsuccessfully to anchor the HOUSTON near the SPM; by 1830, however, he had succeeded in backing the HOUSTON a little more than a mile away from the SPM. The HOUSTON there made a lee for the NENE to avoid her being swamped by the heavy seas and to steady the hose's movements as the NENE's crew tried to hold the hose away from the tanker while the HIRI's mooring master and members of the tanker's crew were removing the bolts from the cargo hose before it could be lowered to the sea by the port crane and thereafter towed away from the tanker.

Removal of the bolts consumed more than an hour. At 1927, while the cargo hose was suspended from the ship's starboard crane and before the crane could lower the hose to the sea, efforts to synchronize the movements of the NENE with the tanker failed in the storm. The NENE began moving away from the HOUSTON. (2/17 RT 221-22.) The NENE's movement exerted so much tension on the cargo hose that it caused the crane to topple. The crane operator was thrown to the cage railing of the operator's platform, and the boom of the collapsed crane began sweeping the tanker's deck threatening the lives of the deck crew and creating the danger of its striking the

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[7] The Court of Appeals' opinion states that "[b]y 1803, the small assist vessel Nene was able . . . to get control of the end of the second hose so that it was no longer a threat to the larger ship." App. A. The record shows that the hose was a continuing threat to the HOUSTON until moments before stranding. The opinion later recognizes that the cargo hose caused the port crane to collapse at approximately 1947 injuring the crane operator. App. A.

tanker's manifold which could have caused a disastrous explosion. (2/18 RT 25-26.) The deck crew worked feverishly to restrain the swinging boom, but before the boom could be fully secured, the tanker stranded at 2006.

When the crane collapsed, Captain Coyne ordered his second mate, the first responder for medical casualties, to leave the bridge to evaluate the crane operator's condition. (2/10 RT 113.) The second mate reported that the crane operator appeared to be going into shock from serious injuries. (2/10 RT 119, 122, 124.) Because the Captain had more medical training than his second mate, he decided that he should try to navigate the tanker as quickly as practicable to the safety of the deep seas where he could leave the bridge to examine the crane operator himself.[8]

At 1956, to avoid the hose being trailed by the NENE on the port side, the location of which was not then visible, the Captain ordered the HOUSTON to make a starboard turn when she was 1.1 miles from the shoreline. If he had ordered the tanker again to back, it would have taken an hour to move her one mile. (2/10 RT 90; 2/10 RT 142; Ex. 253.) The location of the tanker at that time had been computed by parallel radar indexing, rather than by plotting fixes on the very small chart of the area aboard

[8] Although the Court of Appeals acknowledged that the crane operator was in shock, it later opined that the crane operator "was in fact not seriously injured." App. A. Although it later turned out that the crane operator was not as seriously injured as he appeared to be when first examined, that fact did not change the apparently life-threatening condition of the crane operator at the time Captain Coyne had to make his navigation choices.

the HOUSTON. Exxon had no reason to believe that the tanker would be anywhere near the stranding area before the SPM failed. While she was making her slow turn, the HOUSTON struck an undersea coral pinnacle on which she stranded, resulting in her total constructive loss.[9]

The District Court's Findings, Conclusions and Judgment. The district court resolved all the conflicts in the evidence in respondents' favor, including the sharp conflicts in the testimony of Exxon's and respondents' expert witnesses with respect to Captain Coyne's navigation of the stricken tanker. It adhered to its prior rulings excluding all of Exxon's evidence on its case-in-chief, and it concluded that Captain Coyne was extraordinarily negligent in ordering the final turn when he had not ordered fixes to be plotted and was not aware of the undersea coral pinnacle on which the vessel stranded. In reaching its conclusions, the district court also relied on two admiralty presumptions, respectively drawn from *The Pennsylvania*, 86 U.S. (19 Wall.) 125, 22 L.Ed. 148 (1874) and *The Louisiana*, 70 U.S. (3 Wall.) 164, 18 L.Ed. 85 (1866).[10]

[9] The evidence was conflicting on the question whether the tanker stranded on a pinnacle shown as a dot on the only available chart of the area or whether the pinnacle was different from the only charted pinnacle. The evidence was also in conflict on the question whether the charted pinnacle could have been seen if fixes had been plotted on the chart because of the small scale of the chart and of the charted pinnacle.

[10] *The Pennsylvania* rule is that when a master of a vessel violates a regulatory duty, he is presumptively at fault. Plotting fixes on a navigation chart is a regulatory duty (33 C.F.R. § 164.11(c)), but that navigation rule is not imposed when the master of a vessel is in perilous circumstances, as the regulations themselves recognize. Both vessels in *The Pennsylvania* were at fault, and the court divided damages equally although

The court denied all of Exxon's post-trial motions and entered partial final judgment against it for loss of the tanker. (CR 661.)

Exxon's appeal from the partial final judgment was dismissed on respondents' motion on the ground that the appeal was premature. (CR 661.) On remand, respondents moved for entry of final judgment on all Exxon's claims for damages caused by the loss of its tanker. (CR 662.) Exxon resisted on the grounds, among others, that final judgment was premature because the court had foreclosed it from introducing evidence in support of its claims for breaches of warranty and for strict liability to which negligence defenses did not apply. (3/14/94 RT 12-13.)

The district court entered judgment for the respondents on all theories of liability, stating that it was sending to the court of appeals the question whether Phase I decided all of Exxon's claims for relief. (3/14/94 RT 19-20; CR 674.) Final judgment was thereupon entered in favor of respondents and against Exxon on April 20, 1994. (App. C.) Exxon filed a timely appeal. (CR 677.)

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the fault of one was presumed and the fault of the other proved. *Id.*, 86 U.S. at 138.

In *The Louisiana*, the Court decided that a moving vessel is deemed to be at fault when she strikes a stationary vessel or a fixed structure.

Nothing in either case suggests that the presumed fault is more than ordinary negligence. Here defense experts opined that the Captain made navigational mistakes; apparently the court concluded that several misjudgments and presumptive fault added up to extraordinary negligence.

Appeal. Exxon argued that the bifurcation order, the trial orders pursuant thereto, and the ultimate judgment deprived it of procedural due process of law because admiralty does not permit either liability for breach of warranty or for tort to be determined by confining the trial solely to the conduct of the plaintiff when the defendants' misconduct is a substantial factor in causing injury. Exxon also contended that negligence of the plaintiff is not a defense to liability for breach of express or implied admiralty warranties; it is relevant only to the assessment of damages – an issue never tried below. *E.g. Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Company*, 376 U.S. 315, 321, 84 S. Ct. 748, 11 L.Ed.2d 732 (1964) (*"Italia Societa"*).

Neither strict liability in tort nor negligence could be decided by trying only the conduct of Captain Coyne. In tort cases, this Court requires maritime losses to be apportioned by comparing degree of the parties' faults. *Reliable Transfer*, 421 U.S. at 405, n.11. (negligence). Admiralty policy is to place the risks of loss on the persons best situated to prevent injuries. *Italia Societa*, 376 U.S. at 324 (warranty). The persons who are best situated in this case to reduce the likelihood of injury to or loss of tankers, injury to seamen and environmental pollution were these respondents, not shipowners or the unfortunate captains whose tankers were imperiled by respondents' dangerous equipment.

Exxon also argued that this Court has not written superseding cause into general maritime law and that the doctrine, as applied below, was in conflict with the comparative fault requirement of *Reliable Transfer*, in conflict with the Eleventh Circuit's decision in *Hercules, Inc. v.*

Stevens Shipping Co., 765 F.2d 1069 (1985) (neither common law superseding cause nor last clear chance survived comparative fault established by *Reliable Transfer*), and irreconcilable with liability based on breaches of admiralty warranties, which sound in contract, not tort. Moreover, as Exxon explained, even if the superseding cause doctrine were theoretically applicable in admiralty tort cases, it had no application here because negligence of a plaintiff in response to reasonably foreseeable hazards created by defendants' misconduct never becomes a superseding cause even in common law tort cases. *Restatement (Second) of Torts* § 442B (1965).

The Ninth Circuit's Opinion. The lower court affirmed, rejecting all of Exxon's contentions. (App. A.) The court held that the doctrine of superseding cause applies to exonerate admiralty defendants from all liability for breach of warranty, strict liability in tort, and negligence even when defendants have conceded that their acts and omissions were substantial factors in causing the marine casualties. Disregarding Exxon's argument that the doctrine would not apply even in shore-based negligence cases under similar circumstances, the court held that the district court correctly found that the Captain's negligence was the sole legal cause of the stranding and that its interpretation of superseding cause was not in conflict with *Reliable Transfer*. The court disregarded Exxon's contention that negligence of a plaintiff in a breach of warranty case is relevant only to apportionment of damages. (App. A.)

The opinion recognized the conflict among the Eleventh, Ninth, Eighth and Fifth Circuits on the question whether the superseding cause doctrine survived *Reliable*

Transfer in maritime tort actions.[11] The court held that the doctrine, as interpreted and applied by it, is a complete defense to actions based on breaches of express and implied admiralty warranties, strict tort liability and negligence, eliminating any need to compare fault. It rejected Exxon's due process attack on the ground that excluding Exxon's evidence on its case-in-chief was within the district court's discretion.

Petition for Rehearing. Exxon called the court's attention to important factual errors and misstatements of Exxon's arguments in the opinion.[12] The Petition for

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[11] *Compare Hercules Inc.*, 765 F.2d 1069, 1075 (intervening negligence did not survive *Reliable Transfer with Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646, 652-53 (5th Cir. 1992) and *Lone Star Indus. Inc. v. Mays Towing Co., Inc.*, 927 F.2d 1453, 1459 (8th Cir. 1991) (disagreeing with the Eleventh Circuit on that point). *See also Hunley v. ACE Maritime Corp.*, 927 F.2d 493, 497, 498 (9th Cir. 1991) (applying superseding cause doctrine in a maritime tort case).

[12] *E.g.*, the opinion states: "Because it maintains the issues of causation, *from breakout to grounding* are inseverable, Exxon avers that it was unfairly prejudiced by bifurcation. We do not agree." [Emphasis added.] App. A. Instead, Exxon had argued that legal cause of the stranding depended on the nature and extent of respondents' contractual duties and duties of care imposed upon them by admiralty tort law, all of which were breached *before* the breakout and that the hazards created by those breaches could not be severed from the events thereafter without denying Exxon the fair trial that the Due Process Clause guarantees. *Gasoline Products Co., Inc. v. Champlin Refining Co.*, 283 U.S. 494, 51 S. Ct. 513, 75 L.Ed. 1188 (1931) and its spawn.

The opinion also states: "Exxon does not dispute the district court's finding that the defendants met the duty of due diligence in all respects." App. ___, n.6. The statement is contradicted by the record.

Rehearing was denied without modifying the opinion to correct the misstatements. (App. B.)

IMPORTANCE OF THE ISSUES PRESENTED

The questions presented are nationally important because uniformity and predictability of admiralty law are vital to national and international merchant shipping, and merchant shipping is a vital part of the Nation's economy. The decision below has especially pernicious impact on American trade with Asia because key ports in trade with the Pacific Rim countries are located in states and territories within the Ninth Circuit's jurisdiction: Alaska, Washington, Oregon, California, Hawaii, Guam and the Trust Territories.

Merchant shippers and their crews have to rely on wharfingers, stevedores, and others to supply them with reasonably safe moorings and facilities over which shipowners have no control. Shipowners take admiralty warranties and the legal duties imposed on such persons very seriously. They also require the assurance of indemnification that admiralty warranties have been previously well understood to provide. Shipowners and seafarers must rely on admiralty warranties and duties being enforced the same way whether their vessels moor in New York, Louisiana, or Hawaii.

Cases within admiralty jurisdiction are controlled exclusively by federal admiralty law. *E.g., East River Steamship Corp. v. Transamerica Delaval*, 476 U.S. 858, 865-66, 106 S. Ct. 2295, 90 L.Ed.2d 858 (1986); *Italia Societa*, 376 U.S. 315, 321, 84 S. Ct. 784, 11 L.Ed.2d 732 (1964); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S.

625, 631, 79 S. Ct. 406, 3 L.Ed.2d 550 (1959). General maritime law has not adopted the harsher rules of common law limiting liability in tort cases. *Kermarec*, 358 U.S. at 631. Strong policy supports uniformity of admiralty law. *E.g., Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674-75, 102 S. Ct. 2654, 73 L.Ed.2d 300 (1982); *Kermarec*, 358 U.S. at 631; *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 408-09, 74 S. Ct. 202, 98 L.Ed. 143 (1953).

Only in the Ninth Circuit does the negligence of a vessel's captain exonerate admiralty warrantors from all liability to the shipowner for their breaches of contract. Only in the Ninth Circuit does negligence of a vessel's captain exonerate tortfeasors from all liability for both negligence and strict product liability, even when the losses that occurred were within the hazards created by defendants' breaches of duty and were reasonably foreseeable.

In the guise of applying the common law superseding cause doctrine to Exxon's claims for relief based on tort, the opinion below revives contributory negligence as a complete defense to maritime torts, although this Court discarded that defense over a hundred years ago in *The Max Morris*, 137 U.S. 1, 11 S. Ct. 29, 34 L.Ed. 586 (1890). This Court adopted comparative fault 20 years ago in *Reliable Transfer*. It has not specifically adopted the superseding cause doctrine into general maritime law, nor has the Court yet resolved the conflict among the circuits on the question whether that doctrine has any application after *Reliable Transfer*. The Ninth Circuit has also injected common law superseding cause into the law of admiralty warranties – a confusion of contract with tort principles irreconcilable with this Court's views on contract liability and contrary to other circuits.

I. THE NINTH CIRCUIT'S DECISION THWARTS THIS COURT'S ADMIRALTY POLICIES

Causation was no longer in issue after respondents conceded that their misdeeds were causes-in-fact of the tanker's loss. Respondents cannot successfully deny that the liability question was whether the risk of stranding was within the risks that the respondents either voluntarily assumed or were required to assume by reason of their warranties and admiralty duties or that stranding was one of the very risks created by the defective equipment furnished to Exxon. This Court's admiralty policy applicable to products liability, as well as the law of negligence, imposes liability on the party best able to take precautions to reduce the likelihood of injury. *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866, 106 S. Ct. 2295, 90 L.Ed.2d 865 (1986) (strict products liability adopted by admiralty law imposes liability on the party best able to protect persons from hazardous equipment); *Reliable Transfer*, 421 U.S. at 405. Even when a warrantor would not be liable in tort for a maritime casualty, he is liable for breach of express and implied admiralty warranties when his breach is a factor in producing injury. Again, admiralty policy is to place the risks of loss on those who are in the best position to reduce the likelihood of injury. *Italia Societa*, 376 U.S. at 320-24.

Tort Liability. In *Reliable Transfer* itself, the captain of plaintiff's tanker was grossly negligent, and his negligence intervened after the defendant's negligence; he was 75 percent at fault for the tanker's grounding. His fault reduced the damages for which the Coast Guard was liable, but it did not exonerate the government from liability.

> That a vessel is primarily negligent does not justify its shouldering all responsibility, nor excuse the slightly negligent vessel from bearing any liability at all. 421 U.S. at 406, 95 S. Ct. 1708, 44 L.Ed.2d 251, 259.

Reliable Transfer was reaffirmed in *City of Milwaukee v. Cement Division, National Gypsum Co.*, ___ U.S. ___, 115 S. Ct. 2091, 132 L.Ed.2d 148 (1995). The shipowner brought this admiralty action against the City for the loss of its vessel when it broke away from the City's mooring in a storm and thereafter sank. The shipowner alleged that the City had breached its duty as a wharfinger by assigning the vessel to a berthing slip known to be unsafe in heavy winds and in failing adequately to warn of hidden dangers in the slip. The City claimed that the shipowner was negligent because its master left the ship virtually unmanned in the winter without personnel aboard who could monitor the weather conditions or who could summon help. The district court held that the shipowner was 96 percent at fault for the loss, and it denied the shipowner prejudgment interest. The appellate court modified the judgment by reducing the shipowner's fault to 75 percent, and it awarded prejudgment interest to the shipowner. This Court affirmed. Citing *Reliable Transfer*, the Court required " 'that damages be assessed on the basis of proportionate fault when such an allocation can reasonably be made.' *McDermott, Inc. v. AmClyde*, 511 U.S. ___, ___ (1994) (Slip Op'n. at 4)." The Court explained that before the prejudgment interest question could arise, the shipowner's recovery had already been reduced by two-thirds by reason of its own negligence. It added:

> The City's responsibility for the remaining one-third is no different than if it had performed the same negligent acts and the owner, instead of

> also being negligent, had engaged in heroic maneuvers that avoided two-thirds of the damages. The City is merely required to compensate the owner for the loss for which the City is responsible. *Ibid.*

In our case the HOUSTON's captain and her crew performed heroically to try to rescue the vessel and her seamen from the perils in which respondents' egregious misconduct placed them; but those efforts, in the last minutes, were unsuccessful in saving the ship or preventing injury to the seamen.

The policy reasons for apportioning losses by comparing the degrees of fault of those whose misconduct contributed to the casualty are explicit in *Reliable Transfer*:

> It is difficult to imagine any manner in which the divided damages rule would be more likely to "induce care and vigilance" than a comparative negligence rule that also penalizes wrongdoing, but in proportion to measure of fault. A rule that divides damages by degree of fault would seem better designed to induce care than the rule of equally divided damages, because it imposes the strongest deterrent upon the wrongful behavior that is most likely to harm others. *Id.*, 421 U.S. at 405, n.11.

By shifting the entire burden of the loss from respondents to Exxon and disregarding the hazards that respondents created for all tankers that moored at the defective SPM, the Ninth Circuit turned this Court's admiralty policy upside down.

Neither the district court nor the appellate court could compare the degrees of fault of Exxon and the respondents because the bifurcation order and the subsequent orders and judgment entered thereon prevented

Exxon from introducing its evidence that would have established that Captain Coyne's fault was negligible in comparison with respondents' egregious breaches of duty. Even apples cannot be compared with apples with only one apple. The opinion below fails to explain how respondents' admission that their acts and omissions that were causes-in-fact of injury, without more, could permit anyone to determine how respondents' faults could be compared to Captain Coyne's negligence in navigating the distressed tanker.

Breach of Warranty. As this Court explained in *Italia Societa*, a shipowner's negligence in tort does not defeat liability for breach of an implied admiralty warranty, a contract action. The Court held a stevedore liable to the shipowner for injury to its seaman caused by a latent defect in equipment furnished by the stevedore, although the stevedore was not negligent.

> [L]iability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury. Where, as here, injury-producing and defective equipment is under the supervision and control of the stevedore, the shipowner is powerless to minimize the risk; the stevedore is not. 376 U.S. at 324.
>
> [W]e deal here with a suit for indemnification based upon a maritime contract, governed by federal law [citation omitted] in an area where rather special rules govern the obligations and liability of shipowners prevail, rules that are designed to minimize the hazards encountered by seamen, to compensate seamen for the accidents that inevitably occur, and . . . to minimize the likelihood of such accidents. 376 U.S. at 324.

Neither Exxon nor Captain Coyne had any control over the safety of the mooring or the equipment furnished by respondents that created the hazards of grounding, injuries to seamen and environmental damage with respect to *every* tanker that moored at the SPM. The SPM and allied equipment were groundings waiting to happen before the HOUSTON came to Hawaii. To exonerate respondents from all liability because Captain Coyne was negligent does not make common sense, let alone admiralty sense, because its rule imposes *no* deterrent on respondents' wrongful behavior that was the *most* likely to and did injure others.

Liability for Breach of Warranty. As *Italia Societa* pointed out, liability for breach of warranty is based on contract. Negligence of the shipowner, in whose favor the warranty runs, may reduce damages for which the warrantor is liable, but it does not defeat liability. Negligence of the master of a vessel does not relieve the warrantor of safe berth if the berth is, in fact, unsafe. A warrantor of safe berth may "lessen the amount of damages for which he is responsible by showing negligence, or even lack of diligence, on the part of the person wronged, in failing to take steps to lessen certain or even probable damage. . . . [T]his is an issue on which the defendant has the burden." *Paragon Oil Co. v. Republic Tankers, S.A.*, 310 F.2d 169, 173-74 (2d Cir. 1962), *cert. denied*, 372 U.S. 967, 83 S. Ct. 1092, 10 L.Ed.2d 130 (1963).

II. CONFLICTS AMONG THE CIRCUITS AFTER *RELIABLE TRANSFER* AND *ITALIA SOCIETA* ARE NOW RIPE FOR RESOLUTION BY THIS COURT

A. Circuits are Sharply Divided on Applying Intervening Cause Concepts after Reliable Transfer

The decision below deepens the existing conflict among the circuits over the applicability of common law intervening cause doctrines to admiralty tort liability under general maritime law. In *Hercules, Inc.*, 765 F.2d at 1075, the Eleventh Circuit held that neither last clear chance nor intervening cause survived *Reliable Transfer*; after referring to those two doctrines, the court held:

> Under a "proportional fault" system, no justification exists for applying the[se] doctrines . . . unless it can truly be said that one party's negligence did not in any way contribute to the loss, complete apportionment between the negligent parties based on their respective degrees of fault, . . . is the proper method for calculating and awarding damages in maritime cases. 765 F.2d at 1075.

The Fifth Circuit reached the opposite conclusion in *Donaghey v. Ocean Drilling Exploration Co.*, 974 F.2d 646, 652-53 (5th Cir. 1992), relying in part on the teaching of *Nunley v. M/V Dauntless Colocotronis*, 727 F.2d 455 (5th Cir *en banc*), *cert. denied*, 469 U.S. 832, 105 S. Ct. 120, 83 L.Ed.2d 63 (1984).[13]

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[13] *Lone Star Indus. Inc. v. Mays Towing Co., Inc.*, 927 F.2d 1453, 1459 (8th Cir. 1991) apparently agrees with the Fifth Circuit that the doctrine of superseding cause survived *Reliable Transfer*.

The Ninth Circuit is in conflict with the Second and Fifth Circuits in concluding that a plaintiff's negligence can become a superseding cause of a marine injury when the injury was within the hazards created by defendants' breaches of duty and were or could have been foreseen by them.

In *Petition of Kinsman Transit Co.*, 338 F.2d 708, 723-26 (2d Cir. 1964), *cert. denied sub nom. Continental Grain Co. v. City of Buffalo*, 380 U.S. 944, 85 S. Ct. 1026, 13 L.Ed.2d 963 (1965), an improperly constructed mooring device owned by the wharfinger, Continental Grain, failed during a heavy storm along a navigable river. That failure caused a ship to break away from the mooring. The owner of the breakaway vessel was negligent in leaving the ship unmanned during a heavy storm. The drifting vessel first severed the mooring lines of a second ship which caused the second ship to drift downstream and to collide with a third vessel. The combined collisions temporarily dammed the river that was clogged by ice. The clogging caused upstream flooding that contributed to the collapse of a city bridge. The wharfinger was not relieved of liability for its fault by the intervening negligence of the master of the first vessel, by the negligence of the bridge operator, or by the intervention of heavy storms and ice. It was required to bear its aliquot share of the damages for the multiple casualties that its own negligence set in motion. As Judge Friendly's lucid opinion for the court explains:

> [W]e would find it difficult to understand why one who failed to use the care required to protect others in the light of expectable forces should be exonerated when the very risks that rendered his conduct negligent produced other

> and more serious consequences to such persons that were fairly foreseeable when he fell short of what the law demanded. . . . 338 F.2d at 723-724.

The fact that the wharfinger did not have actual knowledge that the failure of the mooring would trigger this chain reaction did not excuse it from all liability. A reasonably prudent man would have foreseen that possibility if he had thought ahead. *Id.*, 338 F.2d at 723. The court rejected the wharfingers' argument that it was saved from liability because the shipowner's master negligently failed to take action that would have avoided the losses, stating that the argument grew out of "the discredited notion that only the last wrongful act can be a cause – a notion as faulty in logic as it is wanting in fairness." *Id.* at 719.[14]

The Fifth Circuit agreed with the Second in *Watz v. Zapata Off-Shore Co.*, 431 F.2d 100, 116 (5th Cir. 1970) in holding that the furnisher of a defective hoist was not relieved of liability because it did not actually foresee the extent of the harm nor the manner in which it occurred because the risk of injury created by a defective weld "encompassed the sort of injury that occurred." 431 F.2d at 116. In that case a shipyard worker aboard a vessel was injured when the load chain of the hoist broke because it was held together by an insufficient weld. Defendants claimed that the defective weld was not the proximate

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[14] The opinion below attempted to distinguish *Kinsman* on the ground that the plaintiff's vessel in that case was unmanned, whereas the HOUSTON was manned. (App. A.) That is a distinction without a legal difference because the relevant fact in that case and ours is that the master of the vessel was found negligent.

cause of the accident because the hoist had been subjected to abuse by the owner. The court said that the resolution of the liability issue is " 'determined by asking whether the intervention or the later cause is a significant part of the risk involved in the defendants' conduct or is so reasonably connected with it that the responsibility should not be terminated.' " 431 F.2d at 116 (quoting *Prosser on Torts* § 51, pp. 309-11 (3d ed. 1964)).

Although the opinion below purports to rely on *Restatement (Second) of Torts*, it disregards the sections that apply precisely to this situation. In deciding whether an intervening force defeats or diminishes a defendant's liability after his own negligence has been established as a substantial factor in the injury, the *Restatement* explains that a "hazard" problem, not a "causation" problem, is presented. *Restatement (Second) of Torts*, Section 281 *comment h* (1965). Section 442B states the applicable black letter principle:

> Where the negligent conduct of the actor [respondents] creates or increases the risks of a particular harm [stranding] and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability, except where the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor's conduct.[15]

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[15] "[A]ny harm which is itself foreseeable [as stranding was in this case], as to which the actor has created or increased the recognizable risk, is always 'proximate,' no matter how it is brought about, except where there is such intentionally tortious or criminal intervention, and it is not within the scope of the risk created by the original negligent conduct." *Id.*, *comment b* to § 442B.

Prosser & Keeton on Torts § 44 at pp. 301, 305, 312-13, 316 (5th ed. 1984) makes the same points. Determination of liability in negligence cases in which forces other than the defendants' act have intervened, presents a question "of the scope of the defendants' obligation, and far removed from causation." (*Id.* at p. 305.) A defendant is not relieved from legal responsibility for losses because no one could have perceived that a loss would occur in the particular way that it did. (*Id.* at §§ 43, 44, at pp. 298-99, 316.)

The stranding of the HOUSTON was within the hazards that respondents' misconduct created. Moreover, masters of vessels imperiled by misconduct of defendants, as well as the forces of the sea and weather, are not required to respond with the imperturbable tranquility of hindsight of expert witnesses who are navigating in a courtroom. Other circuits have consistently recognized that where the master of a vessel is put in the center of destructive forces and he must make hard choices among competing courses, the law requires that there must be something more than mistakes of judgment by the master to find that he was negligent, let alone extraordinarily negligent. *E.g., Employers Ins. of Wausau v. Suwanne River & Spa Lines, Inc.*, 866 F.2d 752, 772 (5th Cir. 1989); *The Gulfstar*, 136 F.2d 461, 465 (3d Cir. 1943); *The Imoan*, 67 F.2d 603, 605 (2d Cir. 1933).

The respondents' serious misconduct was the legal cause of the HOUSTON's loss. Whatever negligence could properly be attributed to Captain Coyne could do nothing more than to reduce the damages for which the respondents were liable.

B. The Circuits are in Conflict on the Impact of Intervening Negligence on Liability for Breach of Admiralty Warranties

The Ninth Circuit's decision below relieves admiralty warrantors from all liability to the shipowner for breach when its vessel's captain is found grossly negligent. The Second Circuit takes the opposite position with respect to admiralty warranties, following standard principles of contract law. *Paragon Oil Co.*, 310 F.2d at 173-74. *Accord International Ore & Fertilizer Corp. v. S.G.S. Controlled Services, Inc.*, 38 F.3d 1279 (2d Cir. 1994) (plaintiffs' contributory negligence is irrelevant to liability founded on an admiralty contract).

Under the general law of contracts, a defendant who has breached the contract cannot relieve himself of liability because the plaintiff was negligent. The injured plaintiff can recover damages for his loss, excluding those damages that he could have avoided by taking reasonable steps to mitigate his loss. *E.g., Restatement (Second) of Contracts* § 350, pp. 125 *et seq.* (1981). Moreover, if the plaintiff has tried to mitigate damages and has been unsuccessful, he may nevertheless recover the full amount of his loss from the defendant. *Ibid.*

III. EXXON WAS DENIED DUE PROCESS BY DISTRICT COURT'S ORDERS PREVENTING IT FROM PROVING LIABILITY

If not foreclosed by the district court's orders and its ultimate judgment, Exxon would have introduced its evidence establishing respondents' liability for breaches of warranties and torts. Responsibility for the tanker's loss could not be confined to the events that happened after

the breakout; the links in the liability chain were forged by respondents before the tanker ever reached Oahu. The lower courts severed the unseverable by cutting the chain in two. Captain Coyne's response to the hazards that respondents' misconduct created was not a special defense, like the running of limitations, that could be separately tried to defeat liability.

This Court in *Gasoline Products Co., Inc.*, 283 U.S. 494, 500, 51 S. Ct. 513, 75 L.Ed. 1188, stated the basic principle for determining whether a claim or an issue can be separately tried: The issue must be so "distinct and separable from the others that a trial of it alone may be had without injustice."[16]

The question whether Captain Coyne's own conduct was even relevant to causation could not properly be determined without first examining the respondents' acts and admissions in the light of the obligations that they either voluntarily assumed or were required to assume as express and implied warrantors, as wharfingers, or as manufacturers or suppliers of dangerous products that failed in the use for which they were intended. Foreclosing Exxon's proof denied it a fair trial and thereby deprived it of procedural due process of law.

Thanks to the district court's foreclosure orders, the evidentiary record is inadequate on which to compare the degrees of fault of the several actors in the drama or to decide who, among them, was best situated to take the

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[16] *See also Smith v. Sperling*, 354 U.S. 91, 95, 77 S. Ct. 1112, 1 L.Ed.2d 1205 (1957) (even when the issue is federal jurisdiction, the issue cannot be tried alone when it is factually interwoven with the merits).

safety precautions that would have prevented the marine casualties that occurred here. The district court was led into constitutional error by the respondents' convincing it that bifurcation would save the court's time. Judicial time could always be saved by preventing plaintiffs from proving their liability cases-in-chief, but the Due Process Clause just says "no" to that shortcut.

CONCLUSION

Exxon is fully aware that this Court does not sit as an error correcting court. The existing confusion and conflicts among the circuits about the proper application of this Court's admiralty policies to maritime tort and contract cases have seriously impaired the requisite uniformity and predictability of general maritime law. The questions presented in this case are of national, immediate concern because the conflicts have adverse impact on national and international merchant shipping.

Dated: July 21, 1995

Respectfully submitted,

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Admitted to the Bar
of the Supreme Court
on January 8, 1962

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EXXON COMPANY; EXXON SHIPPING COMPANY,

Plaintiffs-Counter-defendants-Third-Party Defendants-Appellants,

v.

SOFEC, INC.,

Defendant-Counter-claimant-Appellee,

PACIFIC RESOURCES, INC.; HAWAIIAN INDEPENDENT REFINERY, INC.; PRI MARINE, INC.; PRI INTERNATIONAL, INC.,

Defendants-Cross-claimants-Third-Party Plaintiffs-Appellees,

v.

GRIFFIN WOODHOUSE, Griffin Woodhouse, Inc.,

Third-Party Defendant-Appellee,

BRIDON FIBRES AND PLASTICS, LTD.,

Defendant-Third-Party Defendant-Appellee.

No. 94-15806

D.C. No. CV-90-0271-HMF

OPINION

Appeal from the United States District Court
for the District of Hawaii
Harold M. Fong, Chief District Judge, Presiding

Argued and Submitted
March 14, 1995 – San Francisco, California

Filed April 26, 1995

Before: William C. Canby, Jr., Charles Wiggins,
and Thomas G. Nelson, Circuit Judges.

Opinion by T.G. Nelson

SUMMARY

**Admiralty and Marine/Negligence/
Civil Litigation and Procedure**

The court of appeals affirmed a district court order. The court held that the district court did not err in finding a captain's extraordinary negligence to be the sole proximate and superseding cause of damage to a vessel that broke away from a mooring system and later ran aground.

The Exxon *Houston*, a tanker belonging to appellants Exxon Shipping Co. and Exxon Company U.S.A. (Collectively, Exxon), broke away from a Single Point Mooring System (SPM) manufactured by appellee Sofec, Inc. and sold by appellee Pacific Resources, Inc. and associated corporations (collectively, HIRI). A storm had caused a break in the chafe chain linking the vessel to the SPM. As the vessel drifted, two oil hoses broke away from the SPM, and one hose interfered with the ship's ability to maneuver.

Immediately after the second hose parted (the "breakaway"), the Coast Guard contacted the *Houston* to see whether it needed assistance. Captain Kevin Coyne refused the offer. During the 2 hours and 4 minutes following the breakout, Coyne took the ship through a series of phases including an attempt to anchor. Coyne failed to plot the ship's position on the chart for a period of time, relying entirely on parallel indexing. For a time, Captain Coyne was alone on the bridge. He proceeded to make a final turn toward shore, which resulted in the ship's stranding. The ship ran aground.

Exxon filed a complaint in admiralty against HIRI and Sofec for the loss of its ship and cargo, and for oil spill cleanup costs. HIRI filed a third-party complaint against appellees Bridon Fibres and Plastics, Ltd. and Griffin Woodhouse, Ltd. Griffin moved to bifurcate the trial, and all defendants joined the motion. The district court granted the motion, limiting the first phase of the trial to the issue of causation with respect to the *Houston's* grounding, leaving the issue of causation with respect to the breakout for Phase Two.

The district court found that Coyne's extraordinary negligence was the sole proximate and superseding cause of the ship's grounding. Following motions by Bridon and Exxon, the court entered a final motion precluding all of Exxon's claims for loss of the vessel. Exxon appealed, contending that the district court improperly bifurcated the proceedings and that the doctrine of superseding cause has not application to cases in admiralty.

[1] In *United States v. Reliable Transfer Co.*, the Supreme Court rejected the rule whereby damages were divided equally between or among negligent vessels regardless of the degree of fault attributable to each. [2] The Ninth Circuit has affirmed the continuing viability of superseding cause in the maritime context. The Ninth Circuit previously held that an intervening force supersedes prior negligence where the subsequent actor's negligence was "extraordinary." [3] Thus, superseding cause may act to cut off liability for antecedent acts of negligence in admiralty cases where the superseding cause is the result of extraordinary negligence. The district court did not "disobey" *Reliable Transfer* in employing the concept of superseding cause in this case.

[4] Exxon was incorrect in arguing that it was unfairly prejudiced by the bifurcation. [5] The district court assumed at the outset of Phase One that the defendants' negligence was a cause in fact of the grounding. [6] Moreover, even if Exxon's theory that the HIRI defendants were strictly liable as warrantors of safe berth was accepted, such a finding would not have rendered erroneous either the district court's bifurcation of the trial or its superseding cause analysis. [7] The district court's decision to bifurcate the trial could not be said to have "severed the unseverable" or to have prejudiced Exxon. Bifurcation of the trial was expeditious and appropriate in light of the circumstances of the case.

[8] Under the rule of *The Louisiana*, when a moving vessel strikes a charted reef, it is presumed the vessel is at fault. [9] *The Pennsylvania* stands for the presumption that when a vessel violates a statutory rule meant to prevent

strandings, the violation was a proximate cause of the stranding. [10] In this case, the *Houston* struck a charted reef because her captain had not bothered to fix her position. Exxon neither rebutted nor offered any compelling reason to ignore the traditional admiralty rules laid out in *The Pennsylvania* and *The Louisiana*.

[11] In addition, the district court did not err in holding Coyne to a reasonable standard of care. [12] The district court's finding that Coyne's failure to take fixes was extraordinarily negligent was supported by the record. [13] The district court's finding that the final starboard turn was extraordinarily negligent was also supported by the record. [14] The district court did not clearly err in finding that Coyne had ample time, as well as opportunity and available manpower, to take precautions which would have eliminated the risk of grounding, and that his failure to do so amounted to extraordinary negligence, superseding any negligence of the defendants with regard to the breakout or provision of safe berth after the breakout.

COUNSEL

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David W. Proudfoot, Case & Lynch, Honolulu, Hawaii, for defendant-third-party-defendant-appellee Bridon Fibres and Plastics, Ltd.

OPINION

T.G. NELSON, Circuit Judge:

OVERVIEW

Exxon Shipping Co. and Exxon Company U.S.A. (collectively, "Exxon") appeal the district court's judgment following a bench trial in Exxon's admiralty action seeking damages for loss of its tanker, the Exxon *Houston*, and costs of oil spill cleanup and loss of cargo. Exxon maintains that the failure of a Single Point Mooring System ("SPM") manufactured by defendant Sofec and sold by defendants Pacific Resources, Inc. and associated corporations (collectively, "HIRI"[1]) was the actual and proximate cause of its losses. The district court found in Phase One of a bifurcated proceeding that Exxon's negligence superseded any damage caused by the failure of the SPM, and was the sole proximate cause of the *Houston's* stranding. On appeal, Exxon argues that the district court improperly bifurcated the proceedings and that the doctrine of superseding cause has no application to cases in admiralty. We affirm the district court's order.

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[1] We follow the district court's designation of the defendant corporations, which include Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc., and PRI International, Inc., as "HIRI."

FACTS

This case arises from the stranding of the Exxon *Houston* on March 2, 1989, near the Island of Oahu, several hours after it broke away from an SPM owned and operated by defendants HIRI. The *Houston*, a steam propulsion oil tanker weighing over 72,000 dead weight tons, was engaged in delivering oil via two floating hoses into HIRI's submerged pipeline, pursuant to a contract between Exxon and defendant Pacific Resources International, Inc. ("PRII"), when a heavy southern storm (locally termed a Kona storm) caused a break in the chafe chain linking the vessel to the SPM. As the vessel drifted, the two oil hoses broke away from the SPM. Because the hoses were bolted to the ship rather than secured by more readily detachable safety locks, a long (800 feet) length of one hose remained attached to the ship, and interfered with her ability to maneuver.

While the parting of the first hose did not cause a significant threat to the *Houston*, the parting and partial sinking of the second, longer hose, weighed down by a heavy piece of spool torn from the SPM, threatened to foul the ship's propeller. The parting of the second hose at approximately 1728,[2] designated as the "breakout" or "breakaway," is the initiating point in time for events covered in the Phase One trial.

Immediately after the breakout, the Coast Guard contacted the *Houston* to see whether it needed assistance, but because he was advised assistance vessels would not

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[2] The equivalent local time was 5:28 p.m. In keeping with the record, we refer to nautical time in this opinion.

arrive within two hours, Captain Coyne refused the offer, thinking the problem would be resolved within that time. Captain Coyne did not thereafter request assistance from the Coast Guard. During the two hours and forty-one minutes following the breakout, the *Houston's* Captain, Kevin Coyne, took the ship through a series of phases described in some detail in the district court's findings of fact. These phases are summarized in the following paragraphs.

At about 1740, Captain Coyne attempted to anchor, dropping a single anchor which paid out one shot (90 feet) of chain. On the basis of expert testimony, the district court found that Captain Coyne failed to follow standard maritime practice, which would have involved releasing five to six shots of chain to hold the ship under the circumstances. The *Houston* had twelve shots of chain available for each of its two anchors. After this attempt to anchor failed, Captain Coyne made no further efforts to anchor the *Houston* before it stranded, although the district court found there were numerous places en route he could safely have done so.

By 1803, the small assist vessel *Nene* was able, with the assistance of the *Houston,* to get control of the end of the second hose so that it was no longer a threat to the larger ship. Captain Coyne controlled the *Nene's* movements as necessary to coordinate with the *Houston's* movements. Between 1803 and 1830, Captain Coyne maneuvered the *Houston* out to sea and away from shallow water.

Between 1830 and 2009, the time of stranding, the district court found that Captain Coyne made a series of

ill-advised moves. Perhaps most significant was his failure to plot the ship's position on the chart between 1830 and 2004. Rather than plotting fixes of the vessel's position at regular intervals, Captain Coyne relied after 1830 entirely on parallel indexing, a supplemental technique which, according to Exxon's Navigation and Bridge Organization Manual ("Navigation Manual"), "does not relieve the ship's officer of the duty to frequently plot the position of the ship on the chart by means of navigational fixes." Without a fix, Captain Coyne was unable to make effective use of the chart to check for hazards.

Between 1830 and 1947, the crews of the *Houston* and the *Nene* worked to disconnect the second hose from the *Houston.* This was accomplished by 1947. The *Houston's* port crane collapsed in the process, taking the crane operator's seat with it onto the deck. The second mate went below to attend to the crane operator, who was in shock, leaving Captain Coyne alone on the bridge at 1948. Although the Navigational Manual requires that at least two officers be present on the bridge at all times, Captain Coyne did not call upon any of the other available officers to join him until 2000. The district court found that if the bridge had been properly manned, the stranding danger would have been avoided.

Finally, at 1956, Captain Coyne made a disastrous final turn to the right (toward the shore) which resulted in the ship's stranding. Given that the Kona storm was threatening to push the vessel into shore, it is not clear why the Captain chose to turn right instead of continuing to back out safely to sea, or turning to port, away from the coast. Both options were viable. The district court found Captain Coyne's explanations for his decision

unconvincing. Because he had not taken fixes, Captain Coyne apparently was unaware of the ship's position until he ordered Third Mate Spiller to do so at 2004. Third Mate Spiller testified that on seeing the 2004 fix on the chart, Captain Coyne uttered an expletive and immediately ordered an increased speed. Moments later the ship ran aground on a reef near the shore.

PROCEDURAL HISTORY

In April, 1990, Exxon filed its complaint in admiralty against HIRI and Sofec (the manufacturer of the SPM) for the loss of its ship and cargo, and for oil spill cleanup costs. HIRI filed a third-party complaint against Bridon Fibres and Plastics, Ltd. ("Bridon"), and Griffin Woodhouse, Ltd. ("Griffin").[3] On June 3, 1992, Griffin moved to bifurcate the trial. All defendants joined the motion. The district court granted the motion on July 31, 1992, limiting the first phase of the trial to the issue of causation with respect to the *Houston's* grounding, leaving the issue of causation with respect to the breakout for Phase Two.

After conducting a bench trial in admiralty between February 9, 1993, and March 3, 1993, the district court found that Captain Coyne's (and by imputation, Exxon's) extraordinary negligence was the sole proximate and superseding cause of the *Houston's* grounding. Exxon filed an appeal on June 16, 1993, which was dismissed for lack of a final judgment. Following motions by Bridon and Exxon, the district court entered a final motion precluding all of Exxon's claims for loss of the vessel on

[3] A third company which was dismissed without prejudice.

April 20, 1994. We have jurisdiction over Exxon's subsequent timely appeal pursuant to 28 U.S.C. § 1291, and we affirm the judgment.

ANALYSIS

A. *Applicability of superseding cause in admiralty.*

[1] The district court's conclusions of law are reviewed *de novo*. *Havens v. F/T Polar Mist*, 996 F.2d 215, 217, 1994 A.M.C. 605 (9th Cir. 1993). Exxon argues that the Supreme Court's holding in *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), replacing the historical divided damages rule in favor of comparative negligence in admiralty cases, vitiates the use of concepts such as intervening force and superseding cause. In *Reliable Transfer*, the Court rejected the rule whereby damages were divided equally between or among negligent vessels (usually in collision cases) regardless of the degree of fault attributable to each. *Id.* at 397, 411. In concluding, the Court stated that:

> [W]hen two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault, and that liability for such damages is to be allocated equally only . . . when it is not possible fairly to measure the comparative degree of their fault.

Id. at 411.

In the wake of *Reliable Transfer*, the circuits have considered with sometimes conflicting results the issue of

whether superseding cause may still be used to attribute fault in admiralty cases. In *Hercules, Inc. v. Stevens Shipping Co.*, 765 F.2d 1069 (11th Cir. 1985), on which Exxon relies, the Eleventh Circuit appears to have held the doctrine of superseding cause inapplicable in the maritime context after *Reliable Transfer.* Rejecting appellee's argument that its negligence was not a proximate cause of the accident in question, the *Hercules* court stated:

> The doctrines of intervening cause and last clear chance, like those of "major-minor" and "active-passive" negligence, operated in maritime collision cases to ameliorate the . . . so-called "divided damages" rule [rejected by the Supreme Court in *Reliable Transfer*]. . . .
>
> Under a "proportional fault" system, no justification exists for applying the[se] doctrines. . . . Unless it can truly be said that one party's negligence did not in any way contribute to the loss, complete apportionment . . . is the proper method for calculating and awarding damages in maritime cases.

765 F.2d at 1075.

While *Hercules* was understood by the Eighth Circuit to reject the role of superseding cause altogether in maritime cases, *Lone Star Industries, Inc. v. Mays Towing Co., Inc.*, 927 F.2d 1453, 1458 (8th Cir. 1991), it is not entirely clear whether in rejecting intervening cause the Eleventh Circuit meant merely to reject "normal intervening cause" as defined by Restatement (Second) of Torts ("Restatement") section 443, or whether it meant also to reject "superseding cause" as defined by Restatement section

440.[4] Given that the *Hercules* court explicitly rules that appellee's underlying actions were a proximate cause (as

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[4] Section 440 of the Restatement (Second) of Torts defines superseding cause as:

> an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.

Comment b adds:

> A superseding cause relieves the actor from liability, irrespective of whether his antecedent negligence was or was not a substantial factor in bringing about the harm.

Section 441 defines intervening force as:

> one which actively operates in producing harm to another after the actor's negligent act or omission has been committed.

Section 443 on "normal intervening force" states that:

> [t]he intervention of a force which is a normal consequence of a situation created by the actor's negligent conduct is not a superseding cause of harm. . . .

Section 442 lays out factors for determining whether an intervening force is a superseding cause:

> (a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
>
> (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;
>
> (c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;
>
> (d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;

well as a cause in fact) of the damage, it is plausible that the court would not have ruled out a defense based on superseding cause as the sole proximate cause of the damage.

[2] It is not necessary to resolve here whether the Eleventh Circuit has proscribed the use of superseding cause in admiralty. Several other circuits, most importantly this one, have affirmed the continuing viability of superseding cause in the maritime context. In *Hunley v. Ace Maritime Corp.*, 927 F.2d 493, 497, 1991 A.M.C. 1217 (9th Cir. 1991), we held that an intervening force supersedes prior negligence where the subsequent actor's negligence was "extraordinary" (defined as "neither normal nor reasonably foreseeable"). Thus, a ship's failure to stand by and offer assistance to the sinking vessel with which it had collided was deemed the sole proximate cause of injury to a rescuing vessel's crewman, even though both of the colliding vessels were causes-in-fact of the collision. *Id.* at 496-97. Accordingly, we held the departing vessel "solely responsible" for the injuries of the seaman aboard the rescuing vessel. *Id.* at 498. *See also Protectus Alpha Navigation Co. v. Northern Pac. Grain Growers*, 767 F.2d 1379, 1384, 1986 A.M.C. 56 (9th Cir. 1985) (indicating in dicta that application of the principle

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> (e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;
> (f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

Restatement (Second) of Torts §§440-42 (1965).

of superseding cause in a maritime case "would not have been improper."); *Nunley v. M/V Dauntless Colocotronis*, 727 F.2d 455, 466, 1984 A.M.C. 2920 (5th Cir.) (indicating that superseding cause might come into play in admiralty), *cert. denied*, 469 U.S. 832 (1984); *Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646, 652, 1994 A.M.C. 512 (5th Cir. 1992) (holding that "the doctrine of superseding negligence in maritime cases . . . retains its vitality"); *and cf. Lone Star*, 927 F.2d at 1458-60 (rejecting the *Hercules* approach and applying superseding cause in a case involving ordinary (as opposed to extraordinary) negligence).

[3] We hereby reaffirm that superseding cause may act to cut off liability for antecedent acts of negligence in admiralty cases where the superseding cause is the result of extraordinary negligence. We therefore hold that the district court did not "disobey" *Reliable Transfer* in employing the concept of superseding cause in this case.

B. *The decision to bifurcate.*

The trial court's decision to bifurcate a trial is reviewed for an abuse of discretion. *Counts v. Burlington N. R.R.*, 952 F.2d 1136, 1139 (9th Cir. 1991). Rule 42 of the Federal Rules of Civil Procedure provides in pertinent part:

> [t]he court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, . . . third party claim, or of any separate issue or of any number of claims . . . or issues, always preserving inviolate the right of trial by jury.

[4] Exxon argues that the district court's decision to bifurcate the trial, and to limit Phase One to the issue of causation after the breakout, denied Exxon due process and deprived it of a fair trial by foreclosing it from presenting its case-in-chief. Because it maintains that the issues of causation, from breakout to grounding, are inseverable, Exxon avers that it was unfairly prejudiced by the bifurcation. We do not agree.

[5] The district court assumed at the outset of Phase One that the defendants' negligence was a cause in fact of the grounding. There was thus no need in Phase One for Exxon to establish HIRI's fault in causing the breakout. Rather, Exxon had the burden of proving that the forces set in motion by the breakout were the proximate cause of the grounding. HIRI had the burden of showing by a preponderance of the evidence that Captain Coyne's actions subsequent to the breakout were the sole proximate or superseding cause of the grounding of the vessel, such that the defendant parties were relieved of liability for the *Houston*'s loss.[5]

As the district court noted in its order granting the motion to bifurcate, if it did not find Captain Coyne's navigation after the breakout to be the sole proximate or superseding cause of the grounding, it could "still determine in the first phase of a bifurcated trial the comparative fault (cause) of the grounding as between the breakout and the subsequent navigation of the vessel." The district court noted, too, that it was "well aware of

[5] We find Exxon's argument that the district court improperly allocated the burdens of proof to be without merit.

the possibility that the issue of causation with respect to the breakout may still require a second phase of trial, perhaps before a jury." After a lengthy bench trial, the district court found that Captain Coyne's extraordinary negligence was the sole proximate cause of the grounding of the *Houston*, obviating any need to make a comparative analysis of fault regarding the loss of the ship. "The principles of comparative negligence are not applicable when damages can be apportioned to separate causes based on evidence in the record." *Protectus Alpha*, 767 F.2d at 1383.

[6] Exxon also argues that the district court erred in holding that the safe berth clause in the contract between HIRI and Exxon imposed a duty of due diligence rather than one of strict liability upon the defendants.[6] Had the district court applied the strict liability standard, Exxon indirectly avers, it could not have bifurcated the trial or upheld HIRI's superseding cause defense. We find it unnecessary to decide here which standard of care is appropriate in this context; even were we to accept Exxon's theory that the HIRI defendants were strictly liable as warrantors of safe berth, such a finding would not render erroneous either the district court's bifurcation of the trial, or its superseding cause analysis.

Where, as here, the district court finds the injured party to be the superseding or *sole* proximate cause of the damage complained of, it cannot recover from a party whose actions or omissions are deemed to be causes in

[6] Exxon does not dispute the district court's finding that the defendants met the duty of due diligence in all respects.

fact, but not legal causes of the damage, regardless of whether that party's liability is premised on negligence or strict liability. *See* Restatement (Second) of Torts § 440 cmt. b (1965) ("superseding cause relieves the actor of liability, irrespective of whether his antecedent negligence was or was not a substantial factor in bringing about the harm"); *and see In re Related Asbestos Cases*, 543 F.Supp. 1142, 1150 (N.D. Cal. 1982) (holding the defense of superseding cause applicable in cases of strict liability in tort.)

[7] Given the viability of the superseding cause doctrine in cases such as this one, the district court's decision to bifurcate the trial cannot be said to have "severed the unseverable" or to have prejudiced Exxon. Because bifurcation of the trial was expeditious and appropriate in light of the circumstances of this case and did not result in prejudice to Exxon, we hold the district court did not abuse its discretion in choosing to take this approach.

C. *The district court's finding of extraordinary negligence.*

A district court's findings of fact are reviewed under the clearly erroneous standard. Fed. R. Civ. P. 52(a); *Campbell v. Wood*, 18 F.3d 662, 681 (9th Cir.), *cert. denied*, 114 S. Ct. 2125 (1994). This standard applies to findings of fact made by admiralty trial courts. *Havens*, 996 F.2d at 217. "[R]eview under the clearly erroneous standard is significantly deferential, requiring a definite and firm conviction that a mistake has been committed." *Concrete Pipe and Prod. of Cal. Inc. v. Construction of Cal., Inc. v. Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2280

(1993) (internal quotations omitted); *see also United States v. Ramos*, 923 F.2d 1346, 1356 (9th Cir. 1991). Special deference is paid to a trial court's credibility findings. *Id.* A district court's findings of negligence, including issues of proximate cause, are reviewed under the clearly erroneous standard. *Vollendorff v. United States*, 951 F.2d 215, 217 (9th Cir. 1991). This standard of review is an exception to the general rule that mixed questions of law and fact are reviewed *de novo*. *Id.* "[D]eterminations of negligence in admiralty cases are findings of fact which will be given application unless clearly erroneous." *Hasbro Industries, Inc. v. M/S St. Constantine*, 705 F.2d 339, 341 (9th Cir.), *cert. denied*, 464 U.S. 1013, 104 S. Ct. 537 (1983).

Exxon "recognizes the futility of attacking on appeal the district court's finding that Captain Coyne was negligent" because of conflicting expert testimony on that issue, but argues that the district court erred: 1) in finding Captain Coyne's actions to have been extraordinarily negligent; and 2) in finding Captain Coyne's negligence, even if correctly characterized as "gross," to have been the legal cause of the loss.

The district court made detailed findings of fact and conclusions of law after the bench trial. The district court rested its conclusion that Captain Coyne was extraordinarily negligent, and that his negligence was the sole proximate and superseding cause of the ship's grounding, and thus its loss, on its findings that: 1) Exxon had failed to rebut the presumptive admiralty rules of *The Louisiana*, 70 U.S. (3 Wall.) 164 (1865), and *The Pennsylvania*, 86 U.S. (19 Wall.) 125 (1873); 2) even aside from these presumptions, Captain Coyne acted with extraordinary

negligence; 3) Captain Coyne acted slowly and deliberately and thus cannot have been said to have acted "in extremis;" and 4) Captain Coyne's actions constituted a superseding cause of the ship's loss under Restatement section 442 and the law of this circuit.

[8] Under the rule of *The Louisiana*, when a moving vessel strikes a charted reef, it is presumed the vessel is at fault. 70 U.S. at 173. The vessel may rebut this presumption by showing by a preponderance of the evidence that the collision was the fault of a stationary object, that the moving vessel acted with reasonable care, or that the collision was an unavoidable accident. *Id.*; *see Weyerhaeuser v. Atropos Island*, 777 F.2d 1344, 1347 (9th Cir. 1985). Because the *Houston* struck a charted reef, and because Exxon failed to meet its rebuttal burden, the district court concluded that Captain Coyne's navigation was negligent, and that this negligence was a proximate cause of the stranding.

[9] *The Pennsylvania* stands for the presumption that when a vessel violates a statutory rule meant to prevent strandings, the violation was a proximate cause of the stranding. 86 U.S. at 136. This presumption can be rebutted by a "clear and convincing showing of no proximate cause." *Trinidad Corp. v. S.S. Keiyoh Maru*, 845 F.2d 818, 825 (9th Cir. 1988). The district court found that Captain Coyne's failure to plot fixes between 1830 and 2004, and his failure to call another officer to be bridge between 1948 and 2000, while he stood there alone, violated 33 C.F.R. § 164.11 and § 164.11(a). Because Exxon failed to sustain its burden under the rule, the district court found these statutory violations were a proximate cause of the stranding.

[10] Exxon responds to these findings in a footnote, wherein it notes, with respect to the *Pennsylvania* rule, but without offering any support, that there is no duty to plot fixes in a time of peril, and, with respect to the *Louisiana* rule, that "the Ninth Circuit has questioned whether presumption of fault applies when the ship strikes a submerged structure." Exxon cites *Grace Line, Inc. v. Todd Shipyards Corp.*, 500 F.2d 361, 366 (9th Cir. 1974), in which we "questioned" but did not decide whether the traditional rule would apply in a case where a ship struck a submerged drydock with a hidden recess. *Id.* In the instant case, the *Houston* struck a *charted reef* because her captain had not bothered to fix her position. The analogy to *Grace Line* is not apt. Exxon neither rebuts nor offers any compelling reason to ignore the traditional admiralty rules laid out in *The Pennsylvania* and *The Louisiana*.

Quite apart from these rules, the district court found that Captain Coyne "acted negligently, unreasonably and in violation of the maritime industry standars" in a number of instances. The court cited his failure to anchor properly, or to make more than one attempt to anchor; his failure to request assistance from the Coast Guard or other available ships; his failure to back the vessel far enough from shore; and his decision instead to linger unnecessarily in the vicinity of shore, only a half mile or so from the actual grounding line.

[11] Because the district court found, partly on the basis of the Captain's own testimony, that Captain Coyne acted with calm deliberation and without the pressure of imminent peril, it held him to the standard of "such reasonable care and maritime skill as prudent navigators employ for the performance of similar service." *Stevens v.*

The White City, 285 U.S. 195, 202 (1932). Exxon acknowledges the Captain remained calm, but argues that because the ship was never out of peril, a more lenient standard should have been adopted. Exxon cites no authority on appeal for this proposition. Because the district court's finding that Captain Coyne had ample time in which to reflect and act between 1830 and the time of grounding is well supported by the record, we find that the district court did not err in holding him to a reasonable standard of care.

Finally, the district court found Captain Coyne's negligence not only to be a proximate or legal cause of the stranding, but to be the sole proximate, and thus the superseding, cause of the ship's loss. On the basis of the testimony of the *Houston's* crew and expert witnesses, the district court found that "[a]lthough the breaking of the mooring chain imperilled the ship, the EXXON *Houston* successfully avoided that peril. By 1830, [she] was heading out to sea and in no further danger of stranding." The court recognized from the start that the *Houston's* reaching a point of safety was not by itself enough to break the chain of events set in place by the breakout. Under Restatement sections 442 and 447, as adopted by this Circuit, *Hunley*, 927 F.2d at 497, the Captain's actions after reaching this point of safety would have to be extraordinarily negligent to be deemed a superseding cause cutting off the liability of the defendants. The district court specifically found Captain Coyne's negligence to be extraordinary with respect to the failure to fix and plot the ship's position after 1830, and the decision to make the final starboard turn. The court also found the fact that

the ship grounded almost three hours after the breakaway "was highly extraordinary rather than normal."

Exxon argues that the court's findings of extraordinary negligence are erroneous, maintaining that none of the Captain's decisions were outside the range of discretion or "so bizarre" as to be unforeseeable, and that "the only command that lead [sic] the tanker to strand was the [right] turn order." Exxon also argues that it was unnecessary for the Captain to plot fixes because he knew his position by parallel indexing and there would have been no room on the chart to plot fixes. Finally, Exxon argues that the Captain's concern about the injured crane operator made him anxious.

Exxon interprets Captain Coyne's actions as dependent intervening, and thus not superseding, forces under Restatement section 441. Essentially, Exxon argues that all of the Captain's actions were reactions to the breakout, and thus cannot be reviewed independently. Exxon relies on *Kinsman Transit Co.*, 338 F.2d 708, 723-26 (2d Cir. 1964), *cert. denied*, 380 U.S. 944 (1965), for the proposition that failure to foresee danger will not excuse liability. The case is inapposite. *Kinsman* concerned liability for injuries arising from the drifting of an unmanned vessel after it came unmoored. In the portion of the case cited by Exxon, the court deemed it was foreseeable that an unmanned ship turned loose by a faulty mooring device would come to harm or collide with other vessels. *Id.* The *Houston* was not an unmanned vessel, but one fully manned by and

directed by a captain who was capable of getting her to safety before grounding her by his own acts.[7]

[12] The district court's findings that Captain Coyne's failure to take fixes was extraordinarily negligent is supported by the record. All of the expert witnesses, including Exxon's, testified that it was imprudent and contrary to industry standards for Captain Coyne not to plot fixes after 1830. The record does not support Exxon's contention that plotting fixes would have obliterated the chart. Captain Coyne made no such claim; he explained that he did not plot fixes because he felt it was unnecessary to do so. He believed that he could adequately assess the ship's position through parallel indexing. Exxon's assertion that parallel indexing was sufficient is also contradicted by all of the witnesses, including Exxon's. Captain Coyne's sole reliance on parallel indexing was, moreover, contrary to Navigation Safety Regulations, 33 C.F.R. § 164.11, and to Exxon's own Navigation Manual.

[13] The district court's finding that the final starboard turn was extraordinarily negligent is also supported by the record. Captain Coyne stated that he wanted to get away from shore, but the turn right took him toward shore. As for his concern with the hose and

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[7] *Kinsman* rejects the doctrine of last clear chance under which the trial court had excused the moorers (and the shipowner) from liability. 338 F.2d at 719. While Exxon has analogized superseding cause doctrine to last clear chance, that argument fails, and *Kinsman* does not rescue it. HIRI was not absolved of fault because Exxon had the "last clear chance" to avoid danger, but because the district court found that Exxon's independent and extraordinarily negligent actions were the sole legal cause of the stranding.

danger of collision with the *Nene*, it is undisputed that Captain Coyne made no effort to ascertain the position of the *Nene*. The district court properly rejected the Captain's argument that he could not continue to back up because of his concern for Denton, the injured crane operator, as the man was in fact not seriously injured, no one called upon the Coast Guard or other available ships for assistance in a supposed medical emergency, and the Captain's own testimony that his concerns for Denton did not in fact cause him to do anything he would not otherwise have done.

[14] In sum, the district court found that Captain Coyne had ample time, as well as opportunity and available manpower, to take precautions which would have eliminated the risk of grounding, and that his failure to do so amounted to extraordinary negligence, superseding any negligence of the defendants with regard to the breakout or provision of safe berth after the breakout. Because the district court's findings are well supported by the record, we hold they are not clearly erroneous.

CONCLUSION

We hold the district court did not err in finding Captain Coyne's extraordinary negligence to be the sole proximate and superseding cause of the damage to the *Houston*, and we

AFFIRM.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EXXON COMPANY, EXXON SHIPPING COMPANY, Plaintiffs/Counter-defendants/ Third-Party Defendants/ Appellants, v. SOFEC, INC., Defendant/Counter-claimant/Appellee, PACIFIC RESOURCES, INC., HAWAIIAN INDEPENDENT REFINERY, INC.; PRI MARINE, INC.; PRI INTERNATIONAL, INC., Defendant/Cross-claim-Third-Party Plaintiffs/Appellees, v. GRIFFIN WOODHOUSE, Griffin Woodhouse, Inc., Third-Party Defendant/Appellee, BRIDON FIBRES AND PLASTICS, LTD., Defendant-Third-Party Defendant/Appellee.	No. 94-15806 D.C. No. CV-90-0271-HMF ORDER (Filed May 24, 1995)

Before: CANBY, WIGGINS, and T.G. NELSON, Circuit Judges.

Appellants' Petition for Rehearing is DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

EXXON SHIPPING COMPANY, et al.,

Plaintiffs,

V.

PACIFIC RESOURCES, INC., et al.,

Defendants.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 90-00271HMF
(Filed Apr. 20, 1994)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came for hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that pursuant to Fed. R. Civ. P. 54(b), final judgment is hereby entered against plaintiffs on all causes of action stated in their complaint as follows:

A. In favor of all Defendants on Plaintiffs' claim for damages to and loss of the Exxon Houston; and

B. In favor of Defendants Sofec, Inc., Bridon Fibres and Plastics, Ltd., and Griffin Woodhouse, Ltd., on Plaintiffs' claim for recovery of costs of clean-up of the bunker oil spill.

APR 20 1994
Date

/s/ Walter A. Y. H. Chinn
Clerk

cc:all parties

(By) Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. (A division of Exxon corporation), Plaintiff, vs. PACIFIC RESOURCES, INC.; HAWAIIAN INDEPENDENT REFINERY, INC.; PRI MARINE, INC.; PRI INTERNATIONAL, INC.; and SOFEC, INC., Defendants.	CIV. NO. 90-00271 HMF
PACIFIC RESOURCES, INC.; HAWAIIAN INDEPENDENT REFINERY, INC.; PRI MARINE, INC.; PRI INTERNATIONAL, INC., Third-Party Plaintiffs, vs. BRIDON FIBRES AND PLASTICS, LTD.; GRIFFIN WOODHOUSE, LTD., and WERTH ENGINEERING, INC., Third-Party Defendants.	[FINDINGS OF FACT AND CONCLUSIONS OF LAW]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed May 20, 1993)

On March 2, 1989, the oil tanker EXXON HOUSTON stranded near Barbers Point on the island of Oahu after breaking away from its mooring earlier that day. Between February 9, 1993 and March 3, 1993, the court held a bench trial in this admiralty action relating to the stranding. The trial was the first phase ("Phase One") of a bifurcated proceeding, and was limited to events occurring after the EXXON HOUSTON broke away from its mooring.

The court makes the following findings of fact and conclusions of law. To the extent that any findings of fact herein are more properly construed as conclusions of law, they shall be so construed; and to the extent any conclusions of law are more properly construed as findings of fact, they shall be so construed.

FINDINGS OF FACT

A. Parties

1. Plaintiff Exxon Shipping Company was the owner and operator of the EXXON HOUSTON, an oil tanker. Exxon Shipping Company vessels carry petroleum products for Plaintiff Exxon Company, U.S.A. This order will refer to the Plaintiffs collectively as Exxon.

2. Defendants and Third-party Plaintiffs Pacific Resources, Inc., PRI International, Inc., and Hawaiian Independent Refinery, Inc. are affiliated corporations. These corporations trade in oil and operate the single point mooring and refinery at Barbers Point.

3. Defendant Sofec, Inc. manufactured the single point mooring at Barbers Point.

4. Third-party Defendant Griffin Woodhouse, Ltd. manufactured the chafe chain which held ships to the single point mooring.

5. Third-party Defendant Bridon Fibres and Plastics, Ltd. distributed the chafe chain.

6. Third-party Defendant Werth Engineering, Inc. was dismissed from this action before the trial. This order will refer to the Defendants and Third-party Defendants collectively as the Defendants.

B. Contractual Arrangements

7. Plaintiff Exxon Company, U.S.A., a division of Exxon Corporation, and Defendant PRI International, Inc., ("PRII") entered into a buy/sell arrangement in 1988, pursuant to which Exxon Company, U.S.A. delivered Alaska North Slope crude oil to PRII and PRII delivered West Texas Intermediate crude oil to Exxon Company U.S.A.

8. Among the terms of the agreement was a paragraph entitled "Safe Berth Availability" which provided, in relevant part:

> The terminal shall provide a safe berth to which vessels may proceed to or depart from, and where the vessel can always lie safely afloat. However, notwithstanding anything contained in this clause, the terminal shall not be deemed to warrant the safety of public channels, fairways, approaches thereto, anchorages, or other publicly-maintained areas either inside or outside the port area where the vessel may be directed.

9. On April 4, 1988, at PRII's request, Exxon U.S.A. agreed that the above quoted provision "includes 'single point mooring' ". The provision, as amended, was in effect on March 2, 1989.

10. On June 7, 1988, Exxon U.S.A. agreed to deliver crude oil "by vessel into Hawaiian Independent Refinery, Ewa Beach, Hawaii via offshore single point system, or upon request by PRI vessel into a West Coast refinery or terminal acceptable to Exxon."

11. On March 1, 1989, pursuant to the above contract, the EXXON HOUSTON arrived at the single point mooring (SPM) at Barbers Point, Oahu. The SPM is owned and operated by Defendant Hawaiian Independent Refinery, Inc. (HIRI), an affiliate of PRII.

C. Arrival Of The EXXON HOUSTON At HIRI's SPM

12. At all times relevant to Phase One trial, the EXXON HOUSTON was a single screw, steam propulsion oil tanker, 72,056 dead weight tons and 766.9 feet in length, with shaft horsepower of 19,000 ahead, and approximately 6,000 astern.

13. At all times relevant to Phase One trial, the EXXON HOUSTON was equipped with two forward anchors, mounted on the port and starboard bows respectively, and another anchor astern. The forward anchors carried with them 1,080 feet of anchor chain.

14. At all times relevant to Phase One trial, Kevin Dick was the Master of the EXXON HOUSTON. Kevin Dick has changed his name to Kevin Coyne, and these findings of fact will refer to him as Captain Coyne. Captain Coyne was an employee of Exxon Shipping Company and was acting within the course and scope of his duties throughout the events leading up to the stranding.

15. Previous visits in Exxon tankers had familiarized Captain Coyne with HIRI's single point mooring at Barbers Point. At these earlier visits, HIRI mooring masters had briefed Captain Coyne on the conditions at the SPM. This briefing included information about the unpredictability of currents at the SPM.

16. On March 1, 1989, the EXXON HOUSTON arrived at HIRI's SPM. Captain Stephen Kuntz, a mooring master provided by HIRI, boarded the EXXON HOUSTON and oversaw the mooring of the vessel to the SPM.

17. Before allowing the vessel to moor at the SPM, Captain Kuntz presented to Captain Coyne a document entitled General Instructions, Discharging/Loading Orders and Indemnification, dated March 1, 1989, which Captain Coyne signed.

18. On March 2, 1989, the EXXON HOUSTON was manned by the following officers (other than Captain Coyne) who were employed by Exxon Shipping Company:

Name	Position
Duane Madinger	Chief Mate
Hallock Davis	Second Mate
Raymond Spiller	Third Mate
Richard Spear	Third Mate

All were acting within the course and scope of their duties that day.

19. Third Mate Spear had been relieved by Third Mate Spiller on March 1, 1989, but remained on board through March 2, 1989 as an extra man per Captain Coyne's instructions.

20. On March 2, 1989, Marie Huhnke, a licensed third mate, was employed by Exxon Shipping Company on board the EXXON HOUSTON as an able-bodied seaman (AB).

21. On March 2, 1989, Captain Steven Marvin relieved Captain Kuntz as mooring master and was on board the EXXON HOUSTON at all times relevant to Phase One trial.

22. Captain Marvin was a competent and experienced mooring master by virtue of his naval background, his training as a mooring master, and his 8 years of experience as a HIRI mooring master. Captain Marvin did not have a master's license nor experience aboard commercial tankers as master or first mate. These were HIRI requirements for mooring masters which were instituted after Captain Marvin had begun serving as a mooring master. The court finds Captain Marvin's failure to meet

these requirements to be irrelevant in light of his experience and training and not a cause of the incident on March 2, 1989.

23. On March 2, 1989, the EXXON HOUSTON was moored to HIRI's SPM and discharging oil into HIRI's submerged pipeline. The discharge required two floating hoses, each approximately 840 feet in length, which ran from the port manifold of the EXXON HOUSTON to the SPM. Each hose was secured to the ship's manifold by twelve bolts and several restraining lines.

24. A mooring assembly including a chafe chain and mooring hawser attached the bow of the EXXON HOUSTON to the SPM. During normal operations at the SPM, the mooring assembly held the ship in place and allowed the hoses to float freely without any tension.

D. The Breakout

25. On March 2, 1989, while the EXXON HOUSTON was discharging oil at the SPM, there was a heavy storm with winds and seas coming generally from the south (a Kona storm). At 1715,[1] the storm caused a link in the chafe chain to part. The ship began to drift away from the SPM, putting the hoses under tension.

26. Despite an attempt to keep the ship near the SPM, the hoses parted. The first hose parted close to the water line of the vessel beneath the port manifold of the

[1] In conformance with the trial testimony, all times in these findings are given in Honolulu local time in military format. Thus, 5:15 p.m. Honolulu time is written as 1715.

EXXON HOUSTON at 1725. Because only a short portion of this hose was left attached to the ship, it was not a threat to the ship's subsequent handling.

27. The second hose parted at approximately 1728 on March 2, 1989. This is the point which has been designated as the "breakout" and is the initiating point in time for the Phase One trial.

28. The second hose tore a heavy metal spool piece off the SPM, leaving approximately 840 feet of that hose connected to the ship's port manifold. Approximately 100 feet at the end of the hose sank due to the weight of the spool piece. The remainder of the hose continued to float. (Any further references to "the hose" refer to this second, longer hose.)

29. The hose was long enough to reach the ship's propeller from the port manifold. Captain Coyne was justifiably concerned that the hose would foul the propeller if the ship went forward.

30. A small line handling boat, the NENE, was at the SPM to assist the EXXON HOUSTON when the breakout occurred. The NENE was too small to push or tow the EXXON HOUSTON to safety after the breakout.

31. At 1728, the EXXON HOUSTON's draft was 15 feet forward and 30 feet aft. This left an unusually large portion of the EXXON HOUSTON's bow above the water, making the vessel more difficult to turn in the wind.

32. During the period between 1728 and 2009, the bridge of the EXXON HOUSTON was manned by an able-bodied seaman acting as the helmsman, and the

following vessel's officers and the mooring master as shown below:

A. From 1728 until 1830:
Captain Coyne
Captain Marvin
Second Mate Davis

B. From 1830 until 1948:
Captain Coyne
Second Mate Davis

C. From 1948 until 2000:
Captain Coyne

D. From 2000 until 2009:
Captain Coyne
Third Mate Spiller

33. Two vessels had broken away from HIRI's SPM on previous occasions. In one case the vessel was successfully remoored to the SPM, while in the other case the vessel's master kept the vessel's head to the SPM while the oil hoses were disconnected.

34. At 1730, the U.S. Coast Guard Joint Rescue Coordination Center initiated a radio call to the EXXON HOUSTON asking if assistance was needed. The Coast Guard told Captain Coyne that assistance vessels would take more than two hours to arrive. Captain Coyne refused the offer of assistance, believing that the situation would be resolved within that time.

E. Attempt To Anchor

35. At approximately 1740, Captain Coyne dropped his forward starboard anchor which paid out one shot (15

fathoms/90 feet) of chain. The depth of water in the area where the anchor was dropped is 10-11 fathoms (60-66 feet).

36. The standard practice in anchoring a ship is to release several additional shots of chain which increase the anchor's holding power. When the anchor stops pulling chain out by itself, the ship deploys the extra chain by either going slightly astern or by pushing chain out with the anchor windlass.

37. One shot of chain could not hold the ship in 10-11 fathoms of water. Five to six shots of chain would have been required to hold the EXXON HOUSTON at its 1740 anchoring position. On the evening of March 2, 1989, the EXXON HOUSTON had on board and available 12 shots (1080 feet) of anchor chain for each of the forward anchors.

38. Captain Coyne neither went astern nor engaged the windlass to deploy the chain. Captain Coyne abandoned the anchoring attempt at 1747 after the chain did not pay out of its own accord.

39. While raising the starboard anchor, the long hose became lodged on the anchor. Captain Coyne then ordered the anchor re-lowered to dislodge the hose from the starboard anchor.

40. Although in retrospect this might have provided an opportunity to keep the hose secured away from the propeller, there was a real possibility that the hose would later free itself and again endanger propulsion. Moreover, the situation presented to Captain Coyne was a novel one, and it was not negligent that Captain Coyne did not

think of exploiting the happenstance snagging of the hose.

41. After Captain Coyne raised the starboard anchor at approximately 1747, he never again attempted to anchor the EXXON HOUSTON prior to the stranding.

42. A review of the track taken by the EXXON HOUSTON between 1747 and 2009 shows numerous areas where the vessel could have safely anchored.

F. The Transit

43. By 1803, the NENE had attached a line to the hose and was able to control the end of the hose, keeping it on the EXXON HOUSTON's port side and away from the EXXON HOUSTON's propeller. Captain Coyne ordered the NENE's movements as necessary to coordinate with the EXXON HOUSTON's movements.

44. The EXXON HOUSTON backed out to sea between 1803 and 1830. Its position was plotted on chart # 19362 for times 1740, 1747, 1803, 1820 and 1830. From 1803 to 1830, the EXXON HOUSTON made a course of 260°, proceeding in a generally westerly direction at a speed of 2 knots over ground, on a half astern bell. This course took the EXXON HOUSTON out to sea and away from shallow water.

45. Captain Marvin testified that at 1830, positions for times 1803, 1820, and 1830 were not plotted on the chart. The implication of this testimony is that the three fixes were falsified. Captain Marvin further testified that he had accurately estimated the ship's position at 1830 to

be 800 yards due west of the SPM, a position that conflicts with the plotted 1830 position. The court finds these portions of Captain Marvin's testimony to be not credible in light of the weight of the evidence. The court finds that the 1803, 1820, and 1830 fixes accurately reflect the positions of the EXXON HOUSTON at those times.

G. Post-1830 Maneuvers

46. At 1831, Captain Coyne quit transmitting away from the shore and ordered a slow ahead bell. The change of course at 1831 was not caused by any necessity or emergency and there was no reason why the vessel could not have continued to back out to sea after 1830. At 1830, the EXXON HOUSTON was only slightly more than one mile away from the shore, and about a half mile from the grounding line.

47. The EXXON HOUSTON remained from 0.9 to 1.1 miles from shore from 1830 until 1956. Had Captain Coyne so decided he could have continued to back the ship after 1830 to any distance offshore he wanted. Later in the evening, Captain Coyne could have suspended disconnecting the hose at any time and backed another mile to deeper water. Backing further to sea could have been accomplished without significant risk to the EXXON HOUSTON or the NENE, and in fact posed much less risk than remaining near the shore while a Kona storm tended to push the ship ashore.

48. At 1831, Captain Coyne began backing and filling-alternating short ahead and astern bells to maintain a sheltered lee on the port side of the vessel. The lee

allowed the hose to be disconnected with reduced exposure to the wind and seas from the south. The backing and filling caused the ship to stop its progress away from the shore.

H. Navigation After 1830

49. Between 1830 and 2004 on the evening of March 2, 1989, a period of one hour and thirty four minutes, no positions of the EXXON HOUSTON were plotted on any chart.

50. At some time between 1830 and 2004, the EXXON HOUSTON moved out of the area charted on chart # 19362. At that point, chart # 19357 should have been used. Chart # 19357 was less detailed than chart # 19362, but was adequate for plotting fixes. Fixes could have been plotted on Chart # 19357 without obliterating either prior fixes or the information on the chart.

51. There are adequate charted aids to navigation in the vicinity of Barbers Point.

52. A prudent mariner would have fixed and plotted his vessel's position at least every 15 to 20 minutes in the situation in which the EXXON HOUSTON found itself after 1830 on March 2, 1989. Many factors existed that day that would have compelled a prudent mariner to fix his position frequently. These factors include, but are not necessarily limited to: the proximity to shore, the rough weather pushing the ship shoreward, the difficulty of estimating the ship's position in the dark, the possibility that removing the hose would be a distraction from

navigation, and the difficulty of maneuvering the EXXON HOUSTON with the hose attached.

53. Frequent plotting of the vessel's position would have enabled Captain Coyne to determine the effects of wind, sea and any currents on the tanker, and would have alerted him that he was approaching danger.

54. Captain Coyne had personnel available for the plotting of fixes but failed to use them. As a requirement of receiving a third mate's license, an individual must pass a Coast Guard examination and demonstrate an ability to take and plot fixes. Each of the officers and AB Huhnke were able to take and plot fixes.

55. Captain Coyne testified that between 1830 and 1956, he navigated by the method of parallel indexing, a technique in which a line is drawn on the radar to show relative movement with respect to an object. Using parallel indexing, Captain Coyne endeavored to keep the EXXON HOUSTON at a distance of 0.9 to 1.1 miles from the shore.

56. Parallel indexing is not a substitute for fixing the position of the vessel. Navigation by parallel indexing without plotted fixes is inherently dangerous and a violation of industry standards.

57. With respect to the technique of parallel indexing, the Exxon Navigation and Bridge Organization Manual specifically states as follows:

> Parallel indexing does not relieve the ship's officer of the duty to frequently plot the position of the ship on the chart by means of navigational fixes.

* * *

FAILURE TO FOLLOW THE ABOVE PRECAUTIONS OR TO PROCEED WITHOUT RELIABLE CHARTED FIXES IS DANGEROUS. PARALLEL INDEXING IS A SUPPLEMENTAL NAVIGATIONAL TECHNIQUE ONLY.

Joint Trial Exhibit 250, Appendix G, p. 5 (capitalization in original).

58. Captain Coyne testified at trial that he often ascertained the position of the ship after 1830 even though he failed to plot it on the chart. For the reasons explained below, the court finds this testimony to be not credible.

59. Captain Coyne's trial testimony contradicts his own earlier deposition testimony. Captain Coyne testified at trial that he took bearings to Barbers Point lighthouse after 1830. These bearings and the parallel indexing range taken from the radar supposedly allowed him to ascertain the ship's position. At his deposition on April 3, 1991, however, Captain Coyne testified that he did not remember taking bearings and that he relied on parallel indexing. When asked to explain this discrepancy at the trial, Captain Coyne did not have a plausible explanation.

60. Captain Coyne also testified at trial that he and Second Officer Davis frequently cross-checked their parallel indexing and that both understood the ship's navigational situation. This situation, as described by Captain Coyne and confirmed by the ship's ultimate stranding position, was that the EXXON HOUSTON rounded Barbers Point and moved northward along Oahu's west shore. In order to monitor this progress, Captain Coyne

would have needed to use chart # 19357. In contrast, Second Officer Davis testified in his deposition that he believed the ship had remained near its 1830 position in the area charted on chart # 19362. He further testified that chart # 19357 was not used while he was on the bridge. Second Officer Davis' account shows that he did not know the true position of the ship, and casts further doubt on Captain Coyne's assertion that Second Officer Davis and Captain Coyne cross-checked their positions.

61. The conflicting testimony is not the only evidence that Captain Coyne did not know the position of the EXXON HOUSTON after 1830. As discussed in more detail below, at 1956 Captain Coyne ordered a right turn that took the EXXON HOUSTON directly onto a charted reef. The most plausible explanation for that turn is that Captain Coyne did not know the EXXON HOUSTON's position when he started that turn.

62. Thus, the court finds that Captain Coyne did not take bearings to ascertain the EXXON HOUSTON's position after 1830 on March 2, 1989. From 1830 to 2004, Captain Coyne knew only his range from shore from the parallel indexing plot. This single input did not allow him to fix the ship's position. Without a fix, Captain Coyne was not able to check the chart for hazards.

I. Hose Disconnect And Crane Failure

63. At 1830, Captain Marvin left the bridge of the EXXON HOUSTON to assist with disconnecting the hose. Captain Marvin did not return to the bridge again until after the grounding. Captain Coyne did not ask Captain Marvin to return to the bridge at any time after 1830.

64. It took over an hour to disconnect the hose. After the hose was disconnected, the EXXON HOUSTON's port crane was used to lower the hose into the water. While the hose was suspended from the crane, the NENE and the EXXON HOUSTON moved apart, causing the crane to collapse at 1944.

65. The crane's collapse freed the hose, allowing it to drop into the water. At 1947, the NENE pulled the hose clear of the EXXON HOUSTON.

66. As the crane collapsed, it carried the crane operator's seat onto the deck with it. Chief Mate Madinger feared that the crane operator, AB Ike Denton, had been injured. Denton was taken to his quarters.

67. At 1948, Captain Coyne sent Second Mate Davis from the bridge to evaluate AB Denton's condition. Second Mate Davis had received medical training from Exxon Shipping Company, and was the designated "first responder" for medical casualties.

68. Captain Coyne did not replace Second Mate Davis with another officer on the bridge. From approximately 1948 to 2000, Captain Coyne was the only officer on the bridge of the EXXON HOUSTON. That left the bridge inadequately manned, with no other officer to fix the vessel's position.

69. Between 1948 and the time of the stranding, there were additional ship's officers available for duty on the bridge.

70. Exxon Shipping Company's Navigation and Bridge Organization Manual ("Navigation Manual") required that under conditions similar to those present on

the March 2, 1989, at least two ship's officers be present on the bridge at all time.

71. If the bridge had been properly manned, the danger of stranding would have been avoided.

J. The Final Turn

72. After evaluating AB Denton, Second Mate Davis reported to Captain Coyne that AB Denton was possibly going into shock, but had no external injuries.

73. Because Captain Coyne had more medical training than Second Mate Davis, Captain Coyne decided that he should personally evaluate AB Denton's condition as soon as possible. In order to accomplish this, Captain Coyne decided to rapidly move the ship away from the coast so that he could allow another officer to relieve him on the bridge.

74. At 1956, Captain Coyne commenced the "final turn," a right turn on a half ahead bell, which he then reduced at 1958 to a slow ahead, and he proceeded to execute the attempted turn on slow ahead bell until 2005.

75. Captain Coyne did not look at the navigational chart before commencing the final turn.

76. At the time when he commenced the final starboard turn, Captain Coyne did not know the ship's position.

77. The prevailing directions of the wind and sea, the EXXON HOUSTON's trim condition, and the low engine speed tended to broaden the turn, carrying the

ship towards the shore. Given these factors, a prudent mariner would not have attempted the starboard turn.

78. The starboard turn was towards the coast line, towards shallower water and towards potential danger. The starboard turn was grossly negligent, regardless of whether or not it could have been made successfully.

79. Backing out to sea or turning to port were viable and safe alternatives to the starboard turn. These options would have taken the EXXON HOUSTON away from the coast rapidly, allowing Captain Coyne to leave the bridge and attend to AB Denton.

80. Captain Coyne's stated reasons for rejecting the alternatives to the final turn do not excuse his choice. Captain Coyne testified that he rejected the port turn because of fears of colliding with the NENE and that he rejected backing out to sea because it was too slow and ineffective. Any danger of colliding with the NENE during a port turn could have been easily avoided by radar and/or radio contact. Backing out to sea was also a proven and effective maneuvering option.

81. Third Mate Spiller arrived on the bridge at around 2000. Captain Coyne was in doubt as to the ship's position at that time, and ordered Third Mate Spiller to take a fix of the vessel's position. Third Mate Spiller plotted the fix on chart # 19357 for time 2004.

82. When Captain Coyne saw the 2004 fix on the navigational chart, he exclaimed, "Oh, shit!" He immediately ordered an increased speed of half ahead, followed by full ahead at 2005.5.

83. The EXXON HOUSTON stranded at 2009 approximately 0.5 miles off of Barbers Point at 21° 17.8' N, 158° 07.3' W.

84. The stranding occurred at a reef that was clearly charted on Chart # 19357.

85. Over two and one-half hours elapsed between the breakout and the stranding. During that period, Captain Coyne and his crew had ample time to consider the situation calmly and deliberately.

K. Current Information

86. Exxon has argued that the final turn failed only because of a large current that pushed the ship onto the reef. Exxon claims that the current was predictable, that HIRI should have warned Captain Coyne about the current, and that Captain Coyne would not have attempted the final turn had he known about the current.

87. In his videotaped deposition, Dr. Karl Bathen testified as to the magnitude, direction, and predictability of the currents affecting the ship at Barbers Point on March 2, 1989. That testimony showed that the currents at the area where the ship stranded changed rapidly during the evening.

88. Exxon failed to show that the current studies done by Dr. Bathen could have been reduced to a format that would be easy for a ship's master to use. Dr. Bathen included a large number of variables in his study, including wind magnitude and direction, tide magnitude and direction, sea magnitude and direction, and bottom depths. The court finds that any current data such as that

presented by Dr. Bathen would have been either extremely difficult to use, or would have yielded only very general results.

89. Captain Coyne would not have used current data such as that prepared by Dr. Bathen had it been available to him on the bridge on March 2, 1989. Captain Coyne's decision to turn to starboard was made in haste without due consideration of several other pieces of information which should have caused him to reject the turn. For example, Captain Coyne decided to turn without looking at the chart, without fixing or plotting the vessel's position since 1830, without checking the NENE's position by radar or radio, and without consulting any of his officers or Captain Marvin. In short, Captain Coyne recklessly ignored all pertinent information that was available to him. The court is therefore convinced that Captain Coyne would not have used any current studies had they been available. Therefore, the absence of such studies was not a cause in fact of the stranding.

L. Post-Stranding Changes in SPM Operating Procedures

90. After the events of March 2, 1989, the Coast Guard has required that HIRI provide 30-minute standby tug assistance to tankers at the SPM. The required tugs must be able to handle a disabled tanker in forty knot winds. Had such tug assistance been available on March 2, 1989, Captain Coyne would have used it and the EXXON HOUSTON would not have stranded.

91. In the wake of the EXXON HOUSTON stranding, the Coast Guard has also designated the SPM as a

pilotage area. HIRI is now required to provide two mooring masters with pilot's licenses for ships at the SPM.

CONCLUSIONS OF LAW

1. This is an admiralty and maritime claim within the meaning of Fed. R. Civ. P. 9(h) and within the admiralty jurisdiction of this Court under 28 U.S.C. § 1333.

2. Pursuant to the Order Granting Motion To Bifurcate, entered on July 31, 1992, and the Order Denying Plaintiffs' Motion For Clarification, entered on August 27, 1992, Phase One of the trial was limited to a determination of issues after the breakout of the EXXON HOUSTON at 1728. Phase Two will explore the causes of the breakout.

3. The court bifurcated the trial because a substantial question existed as to whether the post-breakout navigation of the EXXON HOUSTON constituted a superseding, intervening cause of the stranding.

4. In light of the bifurcation order, the alleged causes of the stranding may be divided into three groups: the causes contributing to the breakout; HIRI's post-breakout violations of the safe berth clause; and Exxon's post-breakout navigation. In order to find that any one of these asserted causes justified the imposition of liability, the court would need to find the breach of a duty, that the breach was a cause in fact, and that the breach was a proximate cause of the stranding.

A. The Breakout

5. Exxon has alleged that the Defendants are responsible for the breakout and that the breakout was a proximate cause of the stranding.

6. By bifurcating the trial, the court relieved Exxon of the burden of proving in Phase One that Defendants were at fault or strictly liable for the breakout.

7. Obviously, the breakout was a cause in fact of the stranding, i.e., had the mooring chain not parted, the EXXON HOUSTON would not have stranded.

8. As stated in the court's July 31, 1992 bifurcation order, in order to prove that the breakout was a proximate cause, "Exxon would have to show that the forces set in motion by the breakout of the EXXON HOUSTON continued until the moment of the grounding." *Hahn v. United States*, 535 F. Supp. 132 (D.S.D. 1982). The question of proximate causation is considered below.

B. Post-Breakout Breaches of the Safe Berth Clause

9. Exxon claims that HIRI's SPM was an unsafe berth in breach of the safe berth clause in the Voyage Charterparty between Exxon Shipping Company and PRII. Exxon presented three theories of how the duty was breached: that the mooring masters were inadequate; that tug assistance was inadequate; and that current information was inadequate.

10. The court turns first to the scope of the duty. Although this court has previously referred to the safe berth clause as a "safe berth warranty," the court has not

considered the scope of the charterer's duties under a safe berth clause. Exxon argues for the Second Circuit rule that a charterparty's safe berth clause makes a charterer the warrantor of the safety of a berth. See, e.g., *Park S.S. Co. v. Cities Service Oil Co.*, 188 F.2d 804 (2d Cir.), *cert. denied*, 342 U.S. 862 (1951). HIRI counters that the better rule avoids the imposition of strict liability upon the charterer. Under this rule, a safe berth clause imposes upon the charterer a duty of due diligence to select a safe berth. *Atkins v. Fibre Disintegrating Co.*, 2 Fed. Cas. 78 (E.D.N.Y. 1868) (No. 601), *aff'd* 85 U.S. (18 Wall.) 272 (1873); *Orduna S.A. v. Zen-Noh Grain Corp.*, 913 F.2d 1149, 1157 (5th Cir. 1990). The weight of academic opinion supports the due diligence standard. *See* Gilmore & Black, *The Law of Admiralty*, § 4-4 at pp.205-207 (2d Ed. 1975); J. Bond Smith, Jr., *Time and Voyage Charters: Safe Port/Safe Berth*, 49 Tul. L. Rev. 860, 862-869 (1975). In the absence of Ninth Circuit authority on the question, the court will follow the persuasive reasoning of the Fifth Circuit's *Orduna* opinion. Thus, the court holds that a safe berth clause imposes on the charterer a duty of due diligence to select a safe berth.

11. Having decided the scope of the safe berth duty, the court turns to whether that duty was breached after the breakout. In the following paragraphs, the court concludes that it was not.

12. The first asserted safe berth breach is the inadequacy of mooring master assistance. Exxon contends that HIRI should have provided two mooring masters, and that they should have been certified pilots. As evidence of this duty, Exxon relies upon the fact that the Coast Guard instituted these requirements after the EXXON

HOUSTON stranded. Over HIRI's objection that these were remedial measures, the court allowed this evidence at trial because the Coast Guard mandated the measures. *See In re Aircrash in Bali, Indonesia*, 871 F.2d 812 (9th Cir.), *cert. denied*, 493 U.S. 917 (1989).

13. A duly diligent charterer would not have foreseen a need to provide two mooring masters on March 2, 1989. Exxon adduced no evidence that would show that HIRI should have anticipated that additional mooring master assistance was needed. Indeed, even with the hindsight of knowing how the EXXON HOUSTON stranded, the court sees no need for two mooring masters as neither mooring master fatigue nor unavailability played a role in the casualty. Although the bridge was inadequately manned on the evening of March 2, 1989, there were available ship's officers who could have manned the bridge. Captain Coyne's failure to use his own crew does not create a duty on HIRI's part to supply another mooring master.

14. Similarly, the pilot's license requirement has not been shown to be a necessary element of a safe berth. Although a pilot would have been arguably more familiar with local conditions, lack of experience with local conditions did not contribute to the stranding. Captain Marvin had adequate experience to prevent the casualty had Captain Coyne consulted him after 1830. Thus, HIRI satisfied its safe berth duty by providing one competent mooring master, Captain Marvin.

15. Exxon's second theory is that the berth was unsafe because a tug capable of towing a disabled tanker was not available. As evidence of the need for such tug

assistance, Exxon points out that the Coast Guard has instituted this requirement since the EXXON HOUSTON incident.

16. Exxon has not met their burden of showing that a duly diligent charterer would provide tug assistance. Notably absent from Exxon's case was expert opinion as to the industry standard. In assessing due diligence, the court is left only with the Coast Guard requirement and the nature of the EXXON HOUSTON incident itself. The court considers the Coast Guard requirements to be only minimally relevant to the inquiry of whether the need for tug assistance was foreseeable before March 2, 1989. Countering Exxon's claim that tugs should have been required, the EXXON HOUSTON episode itself shows that a tanker could maneuver itself to a safe position without forward propulsion in a heavy storm. The weight of the evidence does not support Exxon's claim that a duly diligent charterer would have provided additional tug assistance on March 2, 1989.

17. The final safe berth theory is that HIRI should have provided detailed current studies of the grounding area. The evidence that a duly diligent charterer would have done such studies is minimal. Unlike the other theories of safe berth breaches, the Coast Guard has not required current studies in the wake of the EXXON HOUSTON stranding. Moreover, Exxon presented no evidence of the industry standard. HIRI did provide an experienced mooring master who briefed the ship's master on environmental conditions. The court concludes that the safe berth clause did not impose any greater duty on HIRI.

18. In summary, the court concludes that after the breakout, HIRI did not breach any duty imposed by the safe berth clause.

C. Exxon's Negligence

19. The court now turns to whether Exxon negligently navigated the EXXON HOUSTON after the breakout.

20. Captain Coyne and all other officers and crew of the EXXON HOUSTON acted at all times relevant to this claim within the scope of their employment with Exxon, and therefore their negligence, if any, is imputed to Exxon for the purpose of this claim. *Jackson Marine Corp. v. Blue Fox*, 845 F.2d 1307, 1309-1310 (5th Cir. 1988).

21. Per the contract signed by Captain Coyne upon his arrival at the SPM, HIRI's General Instructions, Discharging/Loading Orders and Indemnification, dated March 1, 1989 (Joint Trial Exhibit 92), any negligence of Captain Marvin or of the assist vessel NENE is imputed to Exxon for the purpose of this claim. *Kane v. Hawaiian Independent Refinery, Inc.*, 690 F.2d 722, 723 (9th Cir. 1982).

22. When a moving vessel strikes a charted reef, it is presumed that the vessel is at fault. *The Louisiana*, 70 U.S. (3 Wall.) 164, 173 (1865); *Wardell v. Department of Transp.*, 884 F.2d 510, 512 (9th Cir. 1989); *McAllister Bros., Inc. v. United States*, 709 F.Supp. 1237, 1251 (S.D.N.Y.) (charted reef), *aff'd* 890 F.2d 582 (2d Cir. 1989). Because the EXXON HOUSTON stranded on a charted reef, the presumption of *The Louisiana* rule applies.

23. The presumption of fault pursuant to *The Louisiana* rule suffices to make a *prima facie* case against the moving vessel. The presumption does not disappear when conflicting evidence is presented, but must be overcome by a preponderance of the evidence. *Wardell*, 884 F.2d at 513. *The Louisiana* Rule presumption is universally described as "strong", and as one that places a "heavy burden" on the moving ship to overcome. *Id.* at 512-513 (citing *Carr v. Hermosa Amusement Corp., Ltd.*, 137 F.2d 983, 987 (9th Cir. 1943), *cert. denied*, 321 U.S. 764 (1944)).

24. The strong presumption of negligence arising under *The Louisiana* rule can be rebutted by showing, by a preponderance of the evidence, either that the collision was the fault of a stationary object, that the moving vessel acted with reasonable care, or that the collision was an unavoidable accident. *Wardell*, 884 F.2d at 513 (citing *Bunge Corp. v. M/V Furness Bridge*, 558 F.2d 790, 795 (5th Cir. 1977), *cert. denied*, 435 U.S. 924 (1988)); *Weyerhaeuser Co. v. Atropos Island*, 777 F.2d 1344, 1347 (9th Cir. 1985).

25. The EXXON HOUSTON has failed to meet its *Louisiana* rule burden of proving by a preponderance of the evidence that the EXXON HOUSTON acted with reasonable care, or that the stranding was unavoidable. Thus, the court concludes that Exxon was negligent in the navigation of the EXXON HOUSTON on March 2, 1989, and that such negligence was a proximate cause of the stranding.

26. The admiralty law further presumes that when a vessel violates a statutory rule meant to prevent strandings, the violation was a proximate cause of the stranding. *The Pennsylvania*, 86 U.S. (19 Wall.) 125 (1873); *Mathes v. The Clipper Fleet*, 774 F.2d 980, 982 (9th Cir. 1985); *Waterman S.S. Corp. v. Gay Cottons*, 414 F.2d 724, 736 (9th Cir. 1969) (*Pennsylvania* rule applies to strandings).

27. The presumption arising under *The Pennsylvania* rule can be rebutted by a "clear and convincing showing of no proximate cause." *Trinidad Corp. v. S.S. Keiyoh Maru*, 845 F.2d 818, 825 (9th Cir. 1988).

28. At all times relevant to this claim, the Navigation Safety Regulations codified in Part 164 of Title 33 of the Code of Federal Regulations applied mandatorily to the EXXON HOUSTON and her crew. *See* 33 C.F.R. § 164.01.

29. The Navigation Safety Regulations provide in relevant part:

> § 164.11 Navigation Underway: General.
>
> The owner, master or person in charge of each vessel underway shall ensure that:
>
> (a) The wheelhouse is constantly manned by persons who:
>
> (1) Direct and control the movement of the vessel; and
>
> (2) Fix the vessel's position;
>
> . . .
>
> (c) The position of the vessel at each fix is plotted on a chart of the area and the person directing the movement of the vessel is informed of the vessel's position;

33 C.F.R. § 164.11.

30. The rule of *The Pennsylvania* applies to the EXXON HOUSTON. The EXXON HOUSTON was in violation of the following statutory rules designed to prevent strandings:

a. Between 1830 and 2004, while the EXXON HOUSTON was under way approximately one mile or less from the shore of Oahu, Captain Coyne failed to have the position of the vessel fixed and plotted on a navigational chart, in violation of 33 C.F.R. § 164.11(c).

b. Between 1948 and 2000, during which time the EXXON HOUSTON was under way approximately one mile or less from the shore of Oahu, Captain Coyne was the only officer on the bridge, and was not capable of both directing and controlling the movement of the vessel and fixing the vessel's position, in violation of 33 C.F.R. § 164.11(a).

31. Exxon failed to sustain its burden, under *The Pennsylvania* Rule, of proving by clear and convincing evidence that the above-cited statutory violations could not have caused the stranding of the EXXON HOUSTON. Therefore, the court finds that these statutory violations were a proximate cause of the stranding of the EXXON HOUSTON.

32. In the section that follows, the court has also considered whether Captain Coyne's conduct was negligent without applying the *Pennsylvania* or *Louisiana* rules.

33. Exxon has argued that the EXXON HOUSTON was *in extremis* from the time of the breakout to the time of the stranding, and that Captain Coyne's conduct should be judged by that more lenient standard. *See The Propeller Genesee Chief v. Fitzhugh,* 53 U.S. (12 How.) 443 (1851) and subsequent cases.

34. As Captain Coyne's decisions were made calmly, deliberately and without the pressure of an imminent peril, the *in extremis* rule cannot be applied in this case.

35. In considering whether Captain Coyne was negligent, the court has measured his conduct against the standard of "such reasonable care and maritime skill as prudent navigators employ for performance of similar service." *Stevens v. The White City,* 285 U.S. 195 (1932).

36. Captain Coyne acted negligently, unreasonably and in violation of the maritime industry standards in the following instances:

a. He did not deploy sufficient chain to anchor the ship at 1747.

b. He did not request assistance from the Coast Guard or other available ships.

c. He did not attempt to anchor the ship again after 1747. Anchoring the ship would have prevented the hose removal from becoming a distraction to safe navigation.

d. He failed to continue backing the vessel after 1830 until the vessel reached a safe distance from the shore.

e. He chose to linger in the vicinity of a lee shore, only .4 to .6 miles from the actual grounding line.

37. Captain Coyne's failure to plot fixes between 1830 and 2004 was grossly and extraordinarily negligent and in violation of the maritime industry standards. The danger of stranding could and would have been avoided by regular fixing of the position of the EXXON HOUSTON and plotting it on the navigational chart.

38. Captain Coyne's final starboard turn was grossly and extraordinarily negligent and in violation of the maritime industry standards because he commenced it without knowing the vessel's position.

39. Even if Captain Coyne had known the vessel's position at the onset of the final turn, the turn order was still extraordinarily negligent and in violation of the maritime industry standards because it unnecessarily exposed the vessel to the danger of grounding. In light of the vessel's trim, its maneuvering characteristics, the proximity of the beach, and the weather conditions, the turn was beyond the capability of the vessel. The danger of stranding could and would have been avoided had Captain Coyne backed out or ordered a left turn instead of attempting a right turn.

D. Causation

40. The determination of whether a cause-in-fact was a proximate cause involves a consideration of "public convenience, of public policy, [and] of a rough sense of justice." *Hunley v. Ace Maritime Corp.,* 927 F.2d 493, 497 (9th Cir. 1991) (internal quotations and citations omitted).

41. The analysis of proximate cause involves a determination of whether superseding, intervening causes relieve any earlier causes from legal responsibility. *Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co.*, 565 F.2d 1129, 1137-39 (9th Cir. 1977). A defendant asserting the existence of a superseding intervening cause bears the burden of proving it by a preponderance of the evidence.

42. The following considerations are of importance in determining whether an intervening force is a superseding cause of harm to another:

> (a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
>
> (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of the operation;
>
> (c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or on the other hand, is or was not a normal result of such a situation;
>
> (d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;
>
> (e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him; and

> (f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

Restatement (Second) of Torts § 442 (cited with approval by *Hunley v. Ace Maritime Corp.*, 927 F.2d 493, 497 (9th Cir. 1991)).

43. Determining the causes of the breakout is not necessary to a determination of whether the EXXON HOUSTON's navigation was a superseding, intervening cause of the stranding. When remoteness in time or extraordinarily negligent intervening acts are established, disputed facts regarding the extent of defendant's negligence will not prevent a judgment in favor of defendant. *See, e.g., Gilmore v. Shell Oil Co.*, 613 So.2d 1272 (Ala. 1993); *Greiner v. Whitesboro Sch. Dist.*, 562 N.Y.S.2d 255 (N.Y. App. Div. 1990) (remoteness), *appeal den.*, 557 N.E.2d 1057 (N.Y. 1991); *Brazell v. Board of Educ.*, 557 N.Y.S.2d 645 (N.Y. App. Div. 1990) (extraordinary intervening negligence); *cf. Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646, 650-53 (5th Cir. 1992) (considering only the factors of the *Restatement (Second) of Torts* § 442 in denying summary judgment motion on superseding, intervening cause).

44. The extraordinary negligence of Captain Coyne in failing to fix and plot his vessel's position superseded any force generated by the breakout of the vessel from the SPM as a cause of the stranding and was the sole proximate cause of the stranding of the EXXON HOUSTON. The analysis of the factors listed in the *Restatement (Second) of Torts* § 442 mandates this conclusion:

a. The failure to plot fixes of the vessel after 1830 caused a fully operational vessel which was at that time free of any encumbrances to her navigation to strand on a charted reef not adjacent to HIRI's SPM. That is a harm different in kind from that which would otherwise have and previously had resulted from a breakout. *Id.* § 442(a). The harm that the breakout risked was that a disabled ship would have been driven onto the shore before it could reach safety. The EXXON HOUSTON had reached a safe position and only the gross negligence of its master put it into further danger.

b. Both Captain Coyne's failure to plot fixes of his vessel's position after 1830 and the fact that the vessel stranded almost three hours after the breakout are highly extraordinary rather than normal. *Id.* § 442(b).

c. Captain Coyne's failure to plot fixes after 1830 was entirely independent of the fact of breakout; he voluntarily decided not to plot fixes in a situation where he was able to plot fixes. *Id.* § 442(c).

d. The failure to plot fixes after 1830 was solely Captain Coyne's omission in which Defendants did not participate and could not have participated. *Id.* § 442(d). Captain Coyne was aware of the danger of being set toward the lee shore and negligently failed to avoid it. Therefore, Captain Coyne's negligence is viewed as an intervening force and superseding cause which became the sole proximate cause of the stranding.

e. Captain Coyne's failure to plot fixes after 1830 carries a very high degree of culpability. *Id.* § 442(f). It was a voluntary, unforced decision, and it was grossly

negligent and in violation of all applicable industry standards and regulations.

45. Captain Coyne's extraordinary negligence in ordering the final starboard turn was also a superseding, intervening cause. Applying the factors listed in the *Restatement (Second) of Torts* § 442, the court finds as follows:

a. The harm resulting from the final turn was the stranding at a point far from the SPM. The harm that could have resulted from the breakout was a grounding before the ship regained control. These harms are different in kind. *Id.* § 442(a).

b. Captain Coyne's attempt to turn the ship towards the coast was extraordinarily negligent and not a foreseeable consequence of the breakout. *Id.* § 442(b).

c. The decision to make the final turn was made independently of the breakout and was not foreseeable. *Id.* § 442(c).

d. The Defendants did not participate in the decision to turn the ship. *Id.* § 442(d).

e. The final turn was highly culpable and grossly negligent. *Id.* § 442(f).

46. In summary, the Defendants are not legally responsible for the stranding of the EXXON HOUSTON. Although the breaking of the mooring chain imperilled the ship, the EXXON HOUSTON successfully avoided that peril. By 1830, the EXXON HOUSTON was heading out to sea and in no further danger of stranding. Only the grossly negligent actions of its master endangered the vessel further. Captain Coyne inexplicably chose to loiter

in a dangerous area without fixing his position. Then, while overly concerned by an injury to a crew member, he drove the ship onto a charted reef. It would be manifestly unjust to hold anyone legally responsible for the consequences of these acts other than Captain Coyne and his employer, Exxon.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, MAY 20 1993

/s/ Harold M. Fong
UNITED STATES DISTRICT JUDGE

EXXON SHIPPING COMPANY, et al. v. PACIFIC RESOURCES, INC., et al.; Civ. No. 90-00271 HMF; FINDINGS OF FACT AND CONCLUSIONS OF LAW

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. (A Division of Exxon Corporation), Plaintiffs, vs. PACIFIC RESOURCES, INC., HAWAIIAN INDEPENDENT REFINERY, INC., PRI MARINE, INC., PRI INTERNATIONAL, INC., and SOFEC, INC., Defendants. and PACIFIC RESOURCES, INC., HAWAIIAN INDEPENDENT REFINERY, INC., PRI MARINE, INC., and PRI INTERNATIONAL, INC., Third-Party Plaintiffs, vs. BRIDON FIBRES AND PLASTICS, LTD., GRIFFIN WOODHOUSE, LTD., and WERTH ENGINEERING, INC., Third-Party Defendants.	Civil No. 91-00271 HMF (Filed Jul 31, 1992)

ORDER GRANTING MOTION TO BIFURCATE, DENYING CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT, DENYING MOTION TO STRIKE THIRD-PARTY GRIFFIN WOODHOUSE, LTD.'S REPLY MEMORANDUM AND GRANTING MOTION, IN THE ALTERNATIVE, FOR LEAVE TO FILE RESPONSIVE MEMORANDUM

INTRODUCTION

On July 27, 1992, the court heard third-party defendant Griffin Woodhouse, Ltd.'s ("Griffin") motion to bifurcate or, in the alternative, to continue trial filed on June 3, 1992. Defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc. and PRI International, Inc. (collectively "HIRI") filed a joinder in the motion to bifurcate and an opposition to the alternative motion to continue on June 18, 1992. Defendant and third-party defendant Bridon Fibres and Plastics, Inc. ("Bridon") also filed a joinder in the motion to bifurcate and an opposition to the alternative motion to continue on June 19, 1992. Defendant Sofec, Inc. ("Sofec") also filed a joinder in the motion to bifurcate and an opposition to the alternative motion to continue on June 22, 1992. Plaintiffs Exxon Shipping Company and Exxon Company, U.S.A. (collectively "Exxon") filed a memorandum in opposition on June 18, 1992. Griffin, in turn, filed a memorandum in reply on July 16, 1992. On July 24, 1992, Exxon filed a motion to strike Griffin's reply memorandum or, in the alternative, for leave to file responsive memorandum.

Bridon filed a cross-motion for partial summary judgment on June 18, 1992, which was joined by Sofec and Griffin on June 22, 1992, and by HIRI on June 23,

1992. Exxon filed a memorandum in opposition on July 7, 1992. Bridon, in turn, filed a memorandum in reply on July 16, 1992.

BACKGROUND

This case arises out of the March 2, 1989 breakaway of the EXXON HOUSTON, which was owned and operated by Exxon, from HIRI's single point mooring (SPM) at Barber's Point and subsequent grounding approximately three hours later. The breakaway occurred when a Type "C" chafe chain, which was used to connect the SPM to the EXXON HOUSTON, parted. Post-accident, destructive testing of the chain has indicated that the welds of the chain links *may* have been defective.

DISCUSSION

I. CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

A. Standard for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered when:

> . . . the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The moving party has the initial burden of "identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine

issue of material fact." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987), *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). The movant must be able to show "the absence of a material and triable issue of fact," *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987), although it need not necessarily advance affidavits or similar materials to negate the existence of an issue on which the non-moving party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2553. *But cf., id.*, 477 U.S. at 328, 106 S.Ct. at 2555-56 White, J., concurring)

If the moving party meets its burden, then the opposing party may not defeat a motion for summary judgment in the absence of any significant probative evidence tending to support his legal theory. *Commodity Futures Trading Comm'n v. Savage*, 611 F.2d 270, 282 (9th Cir. 1979). The opposing party cannot stand on his pleadings, nor can he simply assert that he will be able to discredit the movant's evidence at trial. *See T.W. Elec.*, 809 F.2d at 630. Similarly, legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment. *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). Moreover, "if the factual context makes the nonmoving party's claim *implausible*, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." *Franciscan Ceramics*, 818 F.2d at 1468, *citing Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986).

The standard for a grant of summary judgment reflects the standard governing the grant of a directed verdict. *See Eisenberg v. Insurance Co. of North America*, 815 F.2d 1285, 1289 (9th Cir. 1987), *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2512 (1986). Thus, the question is whether "reasonable minds could differ as to the import of the evidence." *Id.*

However, when "direct evidence" produced by the moving party conflicts with "direct evidence" produced by the party opposing summary judgment, "the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact." *T.W. Elec.*, 809 F.2d at 631. Also, inferences from the facts must be drawn in the light most favorable to the non-moving party. *Id.* Inferences may be drawn both from underlying facts that are not in dispute, as well as from disputed facts which the judge is required to resolve in favor of the non-moving party. *Id.*[1]

B. Analysis

With its cross-motion, Bridon seeks a judgment on the pleadings that the parting of the Type "C" chafe chain, which connected the EXXON HOUSTON to the

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[1] For the purposes of deciding this motion, the court applies substantive admiralty law. With respect to the adoption and application of products liability law in admiralty cases, the Supreme Court and the Ninth Circuit have borrowed substantially from principals developed in "land-based" jurisprudence. *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 865-75 (1986); *Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co.*, 565 F.2d 1129, 1133 (9th Cir. 1977).

SPM, was not the proximate cause of the grounding of the EXXON HOUSTON. According to Bridon, the testimony of the vessel's officers shows that, after the EXXON HOUSTON broke out from the SPM, the vessel had reached and remained at a point of safety for one hour and fifteen minutes before she left the safe area and drifted towards the shore, eventually grounding two hours and fifty minutes after the breakout. Bridon further contends that the "undisputed evidence on the record shows that the decision of the vessel's Master to stop the progress of the vessel along her course away from the shore was a voluntary decision made when the vessel was in no imminent danger and when he had ample time to reflect on possible courses of action." As such, Bridon argues that Exxon cannot establish a causal nexus or connection between the parting of the chafe chain and the subsequent grounding nearly three hours later.

At the time of the breakout, the EXXON HOUSTON was connected to the SPM by a mooring assembly, which included a Type "C" chafe chain, manufactured by Griffin and sold by Bridon, and by two oil hoses, eighteen inches (18") in diameter and eight hundred feet (800') long, which were mounted on the ship's manifold. The cause of the failure of the chafe chain and the resulting breakout is disputed.

Once the chafe chain parted, the master of the EXXON HOUSTON, Captain Dick, attempted to prevent the oil hoses from breaking by bringing the vessel's head to the SPM buoy. In spite of his efforts, one hose broke close to the ship, dangling harmlessly from the manifold, whereas the second hose tore at the buoy, with its entire

length remaining connected to the manifold. For the purpose of the motion, Bridon does not contest Exxon's claim that the second hose obstructed the navigation of the EXXON HOUSTON by preventing the vessel from proceeding ahead out of concern that the hose would become entangled in the propeller. Assuming this obstruction, the navigation of the EXXON HOUSTON was restricted to backward movement using astern propulsion.

Furthermore, Bridon assumes, for the purpose of the motion, that from the time of the breakout at approximately 1715 hours until 1803 hours, Captain Dick was attempting to gain control of the vessel. At 1803, Captain Dick set the vessel, moving astern, on a westerly course, roughly parallel to the coastline between Pearl Harbor and Barbers Point. Bridon's Memorandum in Support of Cross-Motion for Partial Summary Judgment, Exhibit B at 212-13, 233 (Deposition of Second Officer Hallock G. Davis, III) ("Davis Deposition"). At 1830 hours, it appears that the EXXON HOUSTON had cleared Barbers Point and was in some 100 feet of water.

The parties dispute, however, whether the EXXON HOUSTON could have continued on the same course until it was positioned far from the shoreline.[2] Although Exxon has admitted that there was no mechanical limitation on the capabilities of the vessel's engines which would have precluded her from continuing on her

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[2] Furthermore, the parties dispute whether the navigation or maneuvering of the EXXON HOUSTON that led to her grounding, *after* the hose had been disconnected, was negligent.

1803-1830 course, Captain Dick has testified that circumstances precluded him from continuing to navigate the EXXON HOUSTON offshore.

> Q. You said that it would be prudent to get further offshore, but the circumstances made it difficult to do so?
>
> A. That's true. . . .
>
> Q. Now, what circumstances are we talking about?
>
> A. The position of the hose, the wind, sea and swell conditions, the ship being able to only use astern propulsion because of the position of the hose.
>
> Q. Did these circumstances remain constant throughout the entire period from the breakaway up and to the grounding?
>
> A. No, they were ever changing, but always present.

Exxon's Memorandum in Opposition, Exhibit 1 at 374-75 (Deposition of Kevin P. Coyne, f.k.a. Kevin Dick)("Dick Deposition").

On the other hand, Second Officer Davis, who was responsible in part for the navigation of the vessel, testified that there was nothing to prevent Captain Dick from continuing on his westerly course – away from shore – proceeding astern.

> Q. Was the ship proceeding generally in a westerly direction from 1803 until 1830?
>
> A. That's correct.

> Q. Do you know of any reason why the vessel, after 1830, could not have proceeded in the same direction?
>
> A. No, I don't.
>
> Q. Was – are you aware of any necessity for change of direction of the vessel at – after 1830?
>
> A. Not that I can recall.

Davis Deposition at 233-35; *see also* Exxon's Memorandum in Opposition, Exhibit 2 at 318 (Deposition of Steve Marvin, HIRI's mooring master) (describing "beautiful" ease with which the EXXON HOUSTON was able to proceed astern). The vessel allegedly remained in the general vicinity of its 1830 position, southwest of Barbers Point, for one hour and fifteen minutes, until 1948 hours, during which time the crew was disconnecting the oil hose. In the process, the hose damaged the vessel's crane and put its operator into danger, requiring the assistance of other crew members. At 2006 hours, the vessel grounded.

It is elementary that Exxon has the burden of proving that the breakout of the vessel from her mooring was the proximate cause of the grounding. 1 Am. Law Prod. Liab.2d *Proximate Causation* § 4:3 (1987); 63 Am. Jur.2d *Products Liability* §§ 261, 264 (1984). Proximate causation is defined as "that cause which, in a natural and continuous sequence, unbroken by any efficient, intervening cause, produces the injury, and without which the result would not have occurred." 1 Am. Law Prod. Liab.3d *Products Liability* § 4:1 (1887); *see generally Hunley v. Ace Maritime Corp.*, 927 F.2d 493, 497 n.1, 1991 A.M.C. 1217

(9th Cir. 1991) (citing Restatement (Second) of Torts on relevant factors used to determine whether intervening force is superseding cause). To prove that the failure of the Type "C" chafe chain proximately caused the grounding, Exxon would have to show that the forces set in motion by the breakout of the EXXON HOUSTON continued until the moment of the grounding. *Hahn v. United States*, 535 F. Supp. 132 (D.S.D. 1982).[3]

The Court of Appeals for the Ninth Circuit has adopted the Restatement (Second) of Torts for the elements of a defense of superseding cause. *Hunley v. Ace Maritime Corp., supra.*

> The following considerations are of importance in determining whether an intervening force is a superseding cause of harm to another:
>
> (a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
>
> (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of the operation;

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[3] Where the relevant facts show that the causal connection between the defendant's negligence and the plaintiff's injury is remote, the question of causation is decided by the court as a matter of law. *Robertson v. Allied Signal, Inc.*, 914 F.2d 360 (3d Cir. 1990); *see also Rexall Drug Co. v. Nihili*, 276 F.2d 637, 645 (9th Cir. 1960) (proximate cause becomes a question of law if evidence is insufficient to raise reasonable inference that act complained of was proximate cause of injury).

> (c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or was not a normal result of such a situation;
>
> (d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;
>
> (e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;
>
> (f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

Restatement (Second) of Torts § 442. In support of its motion, Bridon writes that the court need not determine whether any negligence on the part of Captain Dick created such an intervening force; instead, Bridon relies on the (disputed) fact that the EXXON HOUSTON reached a "point of safety" to establish a superseding cause of the grounding. Bridon refers the court to *V/O Exportkhleb and Insurance Co. of U.S.S.R. (Ingosstrakh) Ltd. v. S.S. William A. Reiss*, 1983 A.M.C. 782 (1982) (E.D. Ohio 1982) for the proposition that "when a vessel which successfully avoids a collision or other emergency, and after having reached a point of safety, goes aground, the initial negligence of the other vessel which had placed the grounded vessel in danger is extinguished as a proximate cause of the grounding." Bridon's Memorandum in Support of Motion for Partial Summary Judgment at 13.

Even though Bridon has pled its case persuasively, the motion must be denied. First, there is a material issue

of disputed fact as to whether Captain Dick was responding to or struggling with the consequences of the breakout, and the attendant, changing circumstances of the rough seas, from the time of the breakout up until the time of the grounding. *See* Restatement (Second) of Torts §§ 443 and 445 (explaining that actions taken in consequence to situation created by negligent conduct are not superseding cause of harm). Because of the conflicting testimony on the capacity of the EXXON HOUSTON to proceed astern, and farther off shore, the issue of causation is not appropriate for summary adjudication at this stage.

Second, Bridon's characterization of the law in this area is only partially accurate. In *V/O Exportkhleb*, the plaintiff's ship went aground five to six *minutes* after it had narrowly avoided colliding with the defendant's vessel. The district court hold that, because the shallow waters were not thrust upon the plaintiff's ship suddenly and the plaintiff had ample opportunity to avoid the danger, the plaintiff's *negligence* after the passing was the proximate cause of the grounding. As such, in order to find that the navigation of the EXXON HOUSTON was a superseding cause of the grounding, this court would be required to find that Captain Dick's actions, in arresting the movement of the vessel at 1830 and, subsequently, in maneuvering the vessel, were, in fact, negligent.[4] *See*

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[4] According to Bridon, once the EXXON HOUSTON was in a safe position in deep water for over one hour, any forces that may have initially been set in motion by the parting of the chafe chain had long since been extinguished. In this regard, Bridon appears to rely on the doctrine of *res ipsa loquitur* – the grounding must have resulted from the (negligent) navigation of the

Dougherty v. United States, 207 F.2d 626, 630, 1953 A.M.C. 1541, 1547 (3d Cir. 1953), *quoted in V/O Exportkhleb*, 1983 A.M.C. at 739. It is not enough, for the purpose of breaking the chain of events set in motion by the breakout, for the court to find that the EXXON HOUSTON had reached a point of safety.

The court would also note that the negligence standard required to establish a superseding cause is higher than in ordinary circumstances. As the Restatement (Second) of Torts instructs:

> The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if
>
> (a) the actor at the time of his negligent conduct should have realized that a third person might so act, *or*
>
> (b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, *or*
>
> (c) the intervening act is a normal consequence of a situation created by the actor's conduct and *the manner in which it is done is not extraordinarily negligent.*

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vessel. As discussed above, a finding that the navigation of the vessel was the superseding cause of the grounding must be predicated on a finding of negligence.

Restatement (Second) of Torts § 447 (emphasis altered). The evidence presented in the record is clearly insufficient to support a finding by this court, on summary judgment, that the navigation of the EXXON HOUSTON by its master was negligent, least not extraordinarily so.

Accordingly, the motion for partial summary judgment is DENIED.

II. MOTION TO BIFURCATE OR IN THE ALTERNATIVE, TO CONTINUE TRIAL

Griffin seeks to bifurcate the issue of causation, as between the breakout and the post-breakout navigation of the EXXON HOUSTON, from the other liability issues in the case – that is, the extent to which the master's navigation of the EXXON HOUSTON caused its grounding on March 2, 1989. Griffin asserts that bifurcation could obviate the need for extensive discovery, trial preparation, and weeks of trial if the court first determines the cause or comparative causes of the grounding, excluding the cause of the breakout. In this regard, Griffin suggests that such an inquiry is discrete and much simpler for adjudication than the cause of the breakout itself.

According to the Marine Casualty Report submitted by Exxon following the accident, the damages alleged by Exxon for the loss of the EXXON HOUSTON amounts to approximately eighty percent (80%) of the total damages claim. *Assuming* that these damages are resolved or allocated in the first phase of a bifurcated trial, Griffin and the other defendants assert that the parties will likely settle the remaining twenty percent (20%) of claimed damages. Exxon disputes these estimates. The court need

not, however, resolve this dispute as a predicate to deciding the motion to bifurcate.

The court has broad discretion to order separate trials pursuant to Rule 42(b) of the Federal Rules of Civil Procedure when a separate trial will further convenience, avoid prejudice or "be conducive to expedition and economy." *See Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1517 (9th Cir. 1985); *Airlift International v. McDonnel Douglas Corp.*, 685 F.2d 267, 269 (9th Cir. 1982). Here, a separate trial offers the probability of settlement after the conclusion of the first phase in the opinion of every defendant. Only Exxon holds to the contrary. Additionally, if the court determines that the navigation of the EXXON HOUSTON was the proximate cause of its grounding, then it would be unnecessary for the court to resolve the issue of "comparative fault." *See Protectus Alpha Navigation v. North Pacific Grain Growers Ass'n*, 767 F.2d 1379 (9th Cir. 1986). In *Protectus*, the plaintiff's ship caught fire while moored at the dock. The defendants employees apparently panicked and negligently cast the ship adrift whereafter the ship was destroyed by fire because the fire fighters could not reach her. In affirming the trial court's disposition, the Court of Appeals for the Ninth Circuit explained why a determination of comparative fault was unnecessary.

> The [district] court found that 92.5% of the loss was sustained after the ship was set adrift, and therefore attributed that percentage of liability to [defendant] North Pacific.
>
> Appellant [North Pacific] contends that the district court erred in ignoring principles of

comparative negligence and apportioning damages based upon its view of causation, rather than culpability. . . .

However, as [plaintiff] Protectus points out, there is no shipowner negligence to "compare." Even if Protectus were negligent in causing the fire, such negligence had ceased to be an operating force when the vessel was cast off by North Pacific's employees. The testimony of each expert and fireman who viewed the fire that night was that the fire would have been put out in fifteen to twenty minutes had the vessel not been cast off. . . .

> Where injuries can properly be apportioned to separate causes based on evidence in the record, there is no occasion to invoke the doctrine of comparative negligence . . The whole point of comparative negligence is that the relation between injury and cause cannot be accurately determined, and an allocation based on the degree of negligence of each party becomes the measure of liability.

767 F.2d 1383-84; *see also Newby v. F/V Kristen Gail*, 937 F.2d 1439, 1992 A.M.C. 149 (9th Cir. 1991) (comparative fault inapplicable where trier of fact concludes that losses can be attributed to separate causes).

On the other hand, if the court does not find that the navigation of the vessel was the superseding cause of the grounding, the court can still determine in the first phase of a bifurcated trial the comparative fault (cause) of the grounding as between the breakout and the subsequent navigation of the vessel. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 95 S. Ct. 1708, 44 L.E.2d 251 (1975). As

discussed earlier, a determination of whether the master's alleged negligence is an intervening, superseding cause, which would cut off defendants' liability at the point of the intervening event, requires an examination of all the claimed causes of the casualty. *See Hunley v. Ace Maritime Corp.*,927 F.2d 493, 1991 A.M.C. 1217 (9th Cir. 1991); *White v. Roper*, 901 F.2d 501 (9th Cir. 1990).

The court is well aware of the possibility that the issue of causation with respect to the breakout may still require a second phase of trial, perhaps before a jury. The court, however, is in the best position to determine whether bifurcation *in this case* promotes judicial economy. The court finds that it does.

Accordingly, the motion to bifurcate is GRANTED so that the first phase of the trial will be limited to the issue of causation with respect to the EXXON HOUSTON's grounding, but not including the issue of causation with respect to the breakout itself.[5]

Finally, the court must address Exxon's motion to strike Griffin's reply memorandum or, in the alternative, for leave to file responsive memorandum. After reviewing Griffin's moving papers, the court does not find that Griffin changed its position vis-a-vis the scope of the first phase of the bifurcated trial in a manner that would violate Local 220-4. Nevertheless, the court, in its discretion, will permit Exxon to file the responsive memorandum attached as an exhibit to its motion. Exxon should be

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[5] Having granted the motion to bifurcate, the court does not address the motion, in the alternative, to continue trial.

advised that the court has carefully reviewed and considered the proposed filing in connection with its ruling on the motion to bifurcate.

Accordingly, the motion to strike is DENIED and the motion, in the alternative, for leave to file responsive memorandum is GRANTED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, July 31, 1992

/s/ Harold M. Fong
UNITED STATES
DISTRICT JUDGE

EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. (A division of Exxon corporation) vs. PACIFIC RESOURCES, INC., HAWAIIAN INDEPENDENT REFINERY, INC., PRI MARINE, INC., PRI INTERNATIONAL, INC., and SOFEC, INC.; PACIFIC RESOURCES, INC., HAWAIIAN INDEPENDENT REFINERY, INC., PRI MARINE, INC., and PRI INTERNATIONAL, INC. vs. BRIDON FIBRES AND PLASTICS, LTD., GRIFFIN WOODHOUSE, LTD., and WERTH ENGINEERING, INC.

Civil No. 91-00271 HMF

ORDER GRANTING MOTION TO BIFURCATE, DENYING CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT, DENYING MOTION TO STRIKE THIRD-PARTY GRIFFIN WOODHOUSE, LTD.'S REPLY MEMORANDUM AND GRANTING MOTION, IN THE ALTERNATIVE, FOR LEAVE TO FILE RESPONSIVE MEMORANDUM